No. 93-126

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HJALMAR SYVERSEN, LILLIAN A. LOUGHLIN, ET AL.,

Petitioners,

- v -

SUMMIT WOMEN'S CENTER WEST, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Did this court in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. __, 113 S.Ct. 753, 122 L.Ed. 2d 34 (1993) foreclose all resort to 42 U.S.C. Section 1985(3) in instances involving persons obstructing access to abortion clinics in Operation Rescue sit-in protests?

II. In light of *Bray*, does opposition to abortion in the form of Operation Rescue sit-in protests at abortion clinics constitute the animus required under 42 U.S.C. Section 1985(3)?

III. In light of *Bray*, do Operation Rescue sit-in protests at abortion clinics constitute a conscious impairment of the right to abortion or the right to interstate travel?

PARTIES

The Petitioners are as follows: Hjalmar Syversen, Lillian A. Loughlin, Joseph M. Scheidler, Randall A. Terry, John Charles Grant, Jean Pollock, Catherine A. Jersey, William Calvin, Robert E. Cooley, Jayne C. Tuller, Dolores M. Teleski, Eileen M. Haggerty and Operation Rescue. All petitioners were defendants in the district court and appellants in the court of appeals (except that Operation Rescue was not an appellant).

The Respondent is: Summit Women's Center West, Inc. which was a plaintiff in the district court and an appellee in the court of appeals.

Operation Rescue is not a corporation pursuant to Rule 29.1.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993
NO. _____

Hjalmar Syversen, Lillian A. Loughlin, et al.,
Petitioners,

v.

Summit Women's Center West, Inc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The decision of the district court is *Town of West Hartford v. Operation Rescue*, which is reported at 792 F. Supp. 161 (D. Conn. 1992) (App. B:A-23 to A-41). The court of appeals reversed in part the district court in an opinion which is reported at 991 F. 2d 1039 (2d Cir. 1993)(App. A:A-1 to A-22).

JURISDICTION

The judgment of the district court was appealed and the decision of the United States Court of Appeals for the second circuit was decided on April 21, 1993. This court has

jurisdiction under 28 U.S.C. Section 1254(1) to review the judgment of the United States Court of Appeals.

STATUTORY PROVISIONS

42 U.S.C. section 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages

> occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are twelve individuals and Operation Rescue, who are personally and morally opposed to abortion, who as participants in peaceful and non-violent public demonstrations and sit-ins, were enjoined under the Ku Klux Klan Act, 42 U.S.C. Section 1985(3).

Despite this court's clear holding in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. __, 113 S. Ct. 753, 122 L. Ed. 2nd 34 (1993) that the Ku Klux Klan Act is not an appropriate federal remedy against Operation Rescue demonstrations, the United States court of appeals for the second circuit, the court below, although vacating the district court's permanent injunction, has remanded the case with instructions which allow the district court, in a review of its facts, to find that the petitioners violated 42 U.S.C. Section 1985(3) by having an invidious discriminatory animus against women in general and for depriving those women of their right to interstate travel or their right to abortion, all of which is directly contrary to this Court's rulings in *Bray*.

This second circuit ruling is a direct challenge to this Court's decision in Bray and is a clear attempt to circumvent Bray by wrongfully limiting Bray to its facts.

This Court has recently reaffirmed the rule of full civil retroactivity in *Harper v. Virginia Dept. of Taxation*, __ U.S. __, 61 U.S.L.W. 4664, 1993 WL 209718 at page 5-6:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given

> full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. ... Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law *or to treat similarly situated litigants differently.*" (emphasis added)

The second circuit is clearly treating "similarly situated litigants differently" in violation of *Harper*. Not only are the petitioners "similarly situated litigants" as those in *Bray*, but one is the same party, i.e. Operation Rescue.[1]

The petitioners desire that this Court vacate the second circuit's judgment in light of this Court's decision in *Bray* which the second circuit has applied in half-hearted evasive manner. The second circuit should not have left the door open to allow Operation Rescue to be found guilty of a right to travel or abortion deprivation or an animus finding in this case below

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[1] The second circuit began its opinion by acknowledging the role of Operation Rescue in the West Hartford demonstrations:

> The events giving rise to this case were massive anti-abortion demonstrations that took place in West hartford, Connecticut, on April 1, 1989, and June 17, 1989. The demonstrations appear to have been the handiwork of *persons associated with Operation Rescue,* an anti-abortion organization whose activities have been the focus of a substantial corpus of litigation in the federal courts. *See, e.g., Bray v. Alexandria Women's Health Clinic*, __ U.S. __; 113 S.Ct. 753 (1993). . . . (emphasis added)

Town of West Hartford v. Operation Rescue, 991 F.2d at 1040 (A-3).

when Operation Rescue was found not to have violated the same provisions of 42 U.S. C. 1985(3) in the *Bray* case.

The second circuit's niggardly reading of *Bray* must be corrected by this Court by summary order to vacate the judgment of the second circuit and remand for further consideration in light of *Bray*.

A. Course Of Proceedings

The Town of West Hartford originally brought this claim in civil racketeering, under 18 U.S.C. Section 1964(c) with various pendent state claims. The district court granted the town's request for a preliminary injunction. *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn 1989)(App. D: A-75 to A-101). The second circuit vacated the injunction and ordered dismissal of the town's state claims for want of subject-matter jurisdiction because of the frivolous nature of the town's RICO claim. *Town of West Hartford v. Operation Rescue,* 915 F. 2d 92 (2d Cir. 1990), *reh'g denied,* ____ F. 2d ____ (2d Cir. December 26, 1990)(App. C: A-42 to A-74). While that appeal was pending, the present Plaintiff-Respondent intervened in the action asserting federal claims of civil RICO and civil rights violations under 42 U.S.C. Section 1985(3) with various pendent state claims.

On May 12, 1992, the district court granted Respondent's Motion for Summary Judgment in part under a "right to abortion" claim under 42 U.S.C. Section 1985(3), and issued a permanent injunction against the Petitioners. *Town of West Hartford v. Operation Rescue*, 792 F.Supp. 161 (D.Conn. 1992)(App. B: A-23 to A-41).

The second circuit vacated the permanent injunction and remanded to the district court with instructions to reconsider the facts and possibly find a valid 42 U.S. C. 1985(3) claim in

contravention of this Court's decision in *Bray*. *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir. 1993) (App. A: A-1 to A-22).

REASONS FOR GRANTING THE WRIT

I. The second circuit court of appeals has wrongfully limited the legal holdings of *Bray v. Alexandria Women's Health Clinic* to its facts.

A. Animus

In the case below, (*Town of West Hartford v. Operation Rescue*, 991 F.2d at 1048 (A-19 to A-20)) the second circuit interpreted *Bray* as follows:

> To the extent that appellants are contending the *Bray* forecloses all resort to § 1985(3) in all instances involving "persons obstructing access to abortion clinics," we think appellants have over-read what the Court announced. . . . But we are of the view that the Court's analysis of the animus aspect of *Bray* is tied to the facts there adduced: --"[t]he record in this case," __ U.S. at __, 113 S.Ct. at 759; "[g]iven this record." *Id.* at __, 113 S.Ct. at 760. Accordingly, we think that an assessment of the animus aspect of the case at bar requires a further review, in the light of the legal principles relating to animus announced in *Bray*, of the record evidence bearing on appellants' motivation.

> In similar fashion, a determination of whether appellants intended to and did inhibit a right protected by § 1985(3) -- either the Fourteenth Amendment abortion right, protected against the state; or the citizenship right to travel without public or private impediment -- calls for scrutiny of the instant record through the prism of the *Bray* Court's pronouncement that "impairment [of the right] must be a conscious objective of the enterprise." __ U.S. at __, 113 S.Ct. at 762.
>
> Since, in the case at bar, (1) the district court's findings with respect to animus require reappraisal, and (2) the district court saw no occasion to make findings on the allegations of interference with the right to travel, we think that the task of revisiting testimony that the district court heard and we did not is best entrusted to the district court. Accordingly, we will remand this case to the district court for further consideration in the light of *Bray*.

Although this Court in *Bray* did not find it necessary to decide whether women in general is a qualifying class under 42 U.S.C. 1985(3), this Court did conclude that the *Bray* petitioners' opposition to abortion did not reflect an animus against women in general. This Court went on to explain that in order to satisfy the animus requirement of 1985(3), the defendant's demonstrations must be motivated by a purpose (malevolent or benign) directed specifically at women as a class. This Court noted that the district court found that "petitioners defined their rescues not with reference to women, but as physical intervention between the abortionists and the innocent victims and that all petitioners shared a deep commitment to the

goals of stopping the practice of abortion and reversing its legalization." *Bray*, 506 U.S. __, 122 L.Ed. at 46.

The second circuit acknowledged that the district court below found that "defendants clearly expressed purpose is to stop the performance of abortions . . ." *Town of West Hartford v. Operation Rescue*, 991 F.2d at 1043 n.4 (A-8). The district court also found that: "Specifically, the defendants declare that their purpose was 'the goal of rescuing babies who were scheduled to be killed.' Defendants' Statement of Material Facts, Section 4.". *Town of West Hartford v. Operation Rescue*, 792 F.Supp. 161, 167 n.6 (D.Conn. 1992)(A-34).

Given the fact that the Petitioners in the case *sub judice* also include Operation Rescue and that the record is replete with the uncontradicted statements by the defendants that their activities arise out of their intention to rescue innocent children from abortion, it makes no sense to remand this case back to the district court for further fact finding, when it has already found this same non-discriminatory intent on the part of defendants.

Given the common party of Operation Rescue and the virtually identical findings of anti-abortion purpose, the second circuit's remand to the district court for "further fact finding" is nothing more than an attempt to vitiate this Court's holding in *Bray* that Operation Rescue sit-in protests do not come within the purview of 42 U.S.C. Section 1985(3).

The second circuit's remand is an inartful attempt to evade the impact of *Bray*, by leaving the door to the federal court house wide open to continued litigation by opponents of Operation Rescue sit-in protests.

B. Right To Travel

This Court held in *Bray* that in order to violate the right to travel, the right must be "aimed at" and "its impairment must be a conscious objective of the enterprise." *Bray*, 506 U.S. __, 122 L.Ed. 2d at 50. This Court further held that a defendant must have as his purpose at least an intention to interfere with the right to travel. The Court concluded: "That was not shown to be the case here, *and is on its face implausible.* (emphasis added). *Bray*, 506 U.S. __, 122 L.Ed. 2d at 49-50.

As in *Bray*, the defendant's actions in the case *sub judice* are directed against abortion and " . . . it is irrelevant to their opposition whether the abortion is performed after interstate travel." *Bray*, 506 U.S. __, 122 L.Ed. 2d at 51.

In addition, this Court held that to violate the right of interstate travel, the defendants must have either erected barriers to interstate travel or treated interstate travelers different from intrastate travelers. *Bray*, 506 U.S. __, 122 L.Ed. 2d at 50. As in *Bray*, the only barriers to physical movement in this case would have resulted from demonstrations restricting movement in the immediate vicinity of the abortion clinic. As this Court concluded:

> Such a purely intrastate restriction does not implicate the right of intrastate travel, even if it is applied intentionally against travelers from other states, unless it is applied *discriminatorily* against them. (emphasis in original).

The second circuit's remand to the district court to determine" . . . whether appellants intended to and did inhibit a right protected by Section 1985(3)" [*Town of West Hartford v. Operation Rescue*, 991 F.2d at 1048 (A-19)] asks the district

court to reach a conclusion which this Court has already deemed to be "implausible".

C. Right To Abortion

The second circuit instructs the district court on remand to scrutinize the record to learn whether the defendants consciously intended to impair the "right to an abortion". *Id.*, 991 F.2d at 1048 (A-19). This Court stated in *Bray* -- again, an identical Operation Rescue sit-in protest -- that the respondent's claim for a deprivation of the right to abortion must fail ". . . because they have identified no right protected against private action that has been the object of the alleged conspiracy." (122 L.Ed. 2d at 52). The facts in *Bray* are identical to the facts before the district court and the second circuit in this case. In *Bray*, one of the petitioners before this Court was Operation Rescue,

> ". . . whose members oppose abortion and six individuals. Among its activities, Operation Rescue organized anti-abortion demonstrations in which participants trespass on, and obstruct general access to, the premises of abortion clinics. The individual petitioners organized and coordinate these demonstrations." (122 L.Ed.2d at 44).

There is no legally significant difference between the facts in *Bray* and the facts before the lower courts in this case. *The facts are identical.* It can only be concluded that the second circuit too narrowly construed and misread this Court's opinion in *Bray* by limiting it to its facts.

Petitioners submit that it is of utmost importance that this Court maintain uniformity in the circuits in their interpretation of this Court's decisions.

For this reason alone, petitioners ask the Court to grant certiorari and vacate the decision of the second circuit, before its faulty reasoning again spreads to other federal courts, as it did when the second circuit began this improvident foray by the federal courts into 42 U.S.C. Section 1985(3) in *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990). The *Bray* Court ultimately rejected the legal reasoning of the second circuit in *New York State N.O.W. v. Terry*. By issuing a summary order to vacate and remand in light of *Bray*, this Court can once and for all stop the second circuit's continued wrongful use of the Ku Klux Klan Act in the context of Operation Rescue demonstrations.

CONCLUSION

For the foregoing reasons, the petitioners pray that this petition be granted and that the judgment of the United States court of appeals for the second circuit *be vacated by summary order and remanded* for further proceedings consistent with this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. __, 113 S. Ct. 753, 122 L.Ed. 2nd 34 (1993). This

Court must not allow the second circuit to so narrowly apply this Court's holding in *Bray* that *Bray* is in effect vitiated.

Respectfully submitted,

Dated: New Milford, Connecticut
July 19, 1993

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APPENDICES

Appendix A:	Opinion of the United States Court of Appeals, Second Circuit, 991 F.2d 1039 (2d Cir. 1993).	A-1
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APPENDIX A

TOWN OF WEST HARTFORD,
Summit Women's Center West, Incorporated,
Plaintiffs-Appellees,
v.
OPERATION RESCUE, Project Life, Inc.,
Connecticut Pro-Life Action Network,
John Kladde, Eileen M. Haggerty,
William P. Cotter, Faithful and
True Roman Catholics,
John Doe, Jane Doe,
Massachusetts Pro-Life Action Network,
Bi-State Operation Rescue Network,
John Henshaw, Thomas J. Herlihy,
Lawrence Dolan,
Defendants,

Joseph M. Scheidler, Randall A. Terry,
John Charles Grant, Jean Pollock,
Catherine A. Jersey, Lillian A. Loughlin,
William Calvin, Hyalmar Syversen,
Robert E. Cooley, Jayne C. Tuller,
Dolores M. Teleski, Defendants-Appellants.

Nos. 321, 92-7595.

United States Court of Appeals,
Second Circuit.
Argued Oct. 19, 1992
Decided April 21, 1993.

*[1040] Jon L. Schoenhorn, Hartford, CT (Schoenhorn & Freeman, Pamela R. Hershinson, West Hartford, CT, on the brief), for plaintiff-appellee Summitt Women's Center West, Inc.

Vincent P. McCarthy, New Milford, CT (Representing all defendants appellants except John Kladde).

Joseph P. Secola, New Milford, CT (The Rutherford Institute of Connecticut, Inc. on the brief), (Representing all defendants-appellants except Randall Terry).

Anthony F. Slez, Jr., Westport, CT (Slez and Slez, on the brief), for amici curiae, Nat. Organization for Women, Connecticut, Nat. Lawyers' Guild, Connecticut Civil Liberties Union, Nat. Abortion Federation, Planned Parenthood Federation of America, Inc., Nat. Abortion Rights Action League, Connecticut Affiliate.

Before KEARSE and MINER, Circuit Judges,
POLLAK,** District Judge.

POLLAK, District Judge:

This case is an appeal from a permanent injunction designed to prevent interference by anti-abortion protesters with access to a women's medical facility patronized by women seeking abortions and related medical services.

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* Bracketed numbers indicate page numbers from decision reported at 991 F.2d 1039 (2d Cir. 1993).

** The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

The events giving rise to this case were massive anti-abortion demonstrations that took place in West Hartford, Connecticut, on April 1, 1989, and June 17, 1989. The demonstrations appear to have been the handiwork of persons associated with Operation Rescue, an anti-abortion organization whose activities have been the focus or a substantial corpus of litigation in the federal courts. *See, e.g., Bray v. Alexandria Women's Health Clinic*, --- U.S. ---. 113 S.Ct. 753 (1993); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992); *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), **[1041]** *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990); *NOW v. Operation Rescue*, 726 F.Supp. 300 (D.D.C. 1989); *Roe v. Operation Rescue*, 710 F.Supp. 577 (E.D.Pa. 1989), *aff'd*, 919 F.2d 857 (3d Cir. 1990). The two West Hartford demonstrations were aimed at Summit Women's Center West ("Center"), a medical facility providing a spectrum of women's services, including abortions. On each occasion, there was mass picketing outside the building in which the Center's offices are located. And on each occasion "rescuers" forced their way into the Center's offices and occupied the premises throughout the business day. On April 1, 1989, the picketing and occupation impeded the Center's scheduled abortions. On June 17, 1989, the Center was prevented from performing any of the scheduled abortions. On both days the demonstrators' unruly conduct required the intervention of approximately forty West Hartford police officers of the Town of West Hartford ("Town")--a third of the town force. On both days, many demonstrators were arrested.

On June 29, 1989, less than two weeks after the second demonstration, the Town brought suit in the United States District Court for the District of Connecticut against Operation Rescue and several individuals allegedly involved in the demonstrations. The federal claims relied on were that (1)

defendants' conduct was Hobbs Act "extortion," 18 U.S.C. § 1951(a), directed both at the Town and at the Center--a pattern of criminal offenses which were predicate acts for purposes of RICO, 18 U.S.C. §§ 1962 *et seq.*; and (2) defendants' conduct constituted a conspiracy to deprive persons of their constitutional rights, in contravention of section 1985(3) of Title 42, the so-called Ku Klux Klan Act.[1] In addition, the Town alleged certain pendent state claims, including a claim of public nuisance. Under both the federal and state claims, the complaint sought injunctive and declaratory relief as well as damages.

In late July of 1989--approximately four weeks after the filing of the Town's complaint--the district court conducted a

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[1] Section 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more the conspirators.

42 U.S.C. § 1985(3) (1988).

three-day evidentiary hearing on the Town's motion for a preliminary injunction. Subsequent to the hearing, the Town withdrew the civil rights conspiracy claim under § 1985(3).

On September 21, 1989, the district court ruled on the Town's motion for a preliminary injunction. See *Town of West Hartford v. Operation Rescue*, 726 F.Supp. 371 (D.Conn. 1989) *rev'd*, 915 F.2d 92 (2d Cir. 1990). In discussing its authority to entertain the Town's RICO claim and pendent state claims, the district court noted that the Town's withdrawal of its § 1985(3) claim "leaves the RICO claim as [the] sole basis for federal jurisdiction over this action." *Id.* at 376.

In detailed findings of the fact the district court outlined the obstructive and invasive conduct shown to have been engaged in, on April 1 and June 17, 1989, by Operation Rescue and several (but not all) of the named individual defendants. In its conclusions of law, the district court held that **[1042]** the Town could not prevail on the injunctive aspect of its RICO cause of action for the reason that the RICO statute does not contemplate the issuance of injunctions in favor of plaintiffs other than the United States. 18 U.S.C. § 1964(c). The district court then went on to consider the pendent causes of action arising under Connecticut law. Concluding that the Town had established a probability of success with respect to its public nuisance claim, the district court entered a preliminary injunction prohibiting Operation Rescue and eight of the individual defendants from entering the Center or obstructing access thereto.

On appeal, this court, on December 26, 1990, vacated the preliminary injunction. *See Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). This court ruled that the Town's RICO allegations did not present even a colorable claim of Hobbs Act "extortion" of the Town, 18 U.S.C. § 1951(b), or of RICO injury to the "business or property" of the Town, 18 U.S.C. § 1964(c). Hence, this court

held that the district court lacked subject-matter jurisdiction of the Town's RICO cause of action.[2] This court further held that, in the absence of subject-matter jurisdiction over the single federal claim presented by the Town, the district court lacked authority to address the Town's pendent state law claims. Accordingly, this court vacated the preliminary injunction entered by the district court and remanded the case with directions to dismiss the Town's complaint. *See* 915 F.2d at 104-05. However, this court noted that, subsequent to the entry of the preliminary injunction, the district court had granted a motion filed by the Center to intervene as a party plaintiff. This court therefore anticipated that the order remanding the case might not terminate the litigation: "We have not considered the sufficiency of the Center's claims, and the district court may in its discretion do so, consistent with this opinion, on remand." *Id.* at 105.

While the appeal from the September 21, 1989 preliminary injunction was pending in this court, there had been further activity in the district court. Subsequent to the Center's intervention as a plaintiff, the Town and the Center, on December 7, 1989, filed a second amended complaint. Named as defendants were Operation Rescue and several of the original individual defendants. Other organizations and individuals were added as defendants, and certain original individual defendants were dropped. The Town's federal cause of action remained its RICO claim; pendent to it were Connecticut law claims of public nuisance and of negligence; certain other pendent Connecticut law claims appearing in the original complaint were dropped. The Center's portion of the second amended complaint invoked federal jurisdiction both under RICO and under § 1985(3). The

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[2] Judge Kearse, in dissent, disagreed with the court's holding that the RICO claim was so patently unmeritorious that the district court lacked subject-matter jurisdiction. *See* 915 F.2d at 105 (Kearse, J., dissenting).

Center's RICO claim, focusing on "extortion," substantially paralleled the Town's RICO claim. The Center's § 1985(3) claim alleged a conspiracy to deny "women seeking abortions and other family planning services at facilities the equal protection of the laws and the equal privileges and immunities under the law and obstructing travel"; the defendants were alleged "to be motivated by an individually discriminatory animus directed at the class of women seeking to exercise their constitutional and legal right to choose abortions and other family planning services . . ." The Center's pleading also alleged pendent Connecticut law claims of nuisance,[3] trespass, tortious interference with business, and negligence. The plaintiffs sought injunctive relief and damages.

On October 12, 1990, the Center moved for a preliminary injunction. On October 31, 1990, the Town also moved for a preliminary injunction. On the same day, the district court held a hearing on the motions for a preliminary injunction; the parties agreed that the evidence taken in July of **[1043]** 1989, in connection with the Town's original motion for a preliminary injunction, could be treated as before the court for purposes of the new preliminary injunction motions.

On July 22, 1991, the district court entered orders (1) dismissing the Town's claims pursuant to this court's directive of December 26, 1990 (915 F.2d at 104-05), and (2) granting the Center's motion for a preliminary injunction. In the portion of the district court's accompanying opinion that discussed the appropriateness of injunctive relief, the district court stated its finding "that Summit is likely to prevail on at least its claim of trespass, *see Whitman Hotel Corp. v. Elliot & Watrous Engineering Co.*, 137 Conn. 562, 570, 79 A.2d 591 (1951);

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[3] "Private" nuisance, as distinct from the claim of "public" nuisance asserted by the Town. Summit's nuisance claim was dismissed on January 31, 1990.

More v. Urbano, 151 Conn. 381, 383, 198 A.2d 211 (1964), if not also its claim of conspiracy to violate the civil rights of the clientele who have a constitutional right to receive an abortion if they wish, *id.*; 42 U.S.C. § 1985(3), from which spring Summit's right to provide the service to those who wish it."

An appeal was taken from the new preliminary injunction. While that appeal--Docket No. 91-7801--was pending, the district court addressed cross-motions for summary judgment. On May 12, 1992, the district court, in a detailed opinion, ruled on the motions. See *Town of West Hartford v. Operation Rescue*, 792 F.Supp. 161 (D.Conn. 1992). The district court (1) granted summary judgment in the defendants' favor on the Center's RICO claim[4] and its Connecticut law claim of trespass;[5] and (2) granted summary judgment in the Center's favor on its § 1985(3) claim and its Connecticut law

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[4] The ground for dismissal of the RICO claim was that "[w]hile plaintiff has clearly demonstrated that it has suffered economic consequences due to defendants' actions, this is not the type of financial loss that the Second Circuit has construed the RICO statute to require," since defendants' "clearly expressed purpose is to stop the performance of abortions, not to make money." 792 F.Supp. at 168. The district court found controlling this court's decisions in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 841, 106 S.Ct 124, 125, 88 L.Ed.2d 102 (1985); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840, 104 S.Ct. 134, 78 L.Ed.2d 128 (1983); and *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), and hence rejected the construction of RICO adopted by the Third Circuit in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989). *See* 792 F.Supp. at 168-69.

[5] The district court's rationale for dismissing the trespass claim was that "[t]o state a claim for trespass under Connecticut law, plaintiff '[m]ust prove possession, title and the absence of actual exclusive possession by another,'" and the Center "neither alleges nor demonstrates that it holds title to the grounds in question." 792 F.Supp. at 169 (citations omitted).

claim of tortious interference with business.[6] Since the district court determined that "the ability of plaintiff to continue to render services to women is compromised by defendants' conduct, particularly in view of the fact that defendants, when asked, have uniformly refused to disavow repetition of the activities of April 1, 1989 and June 17, 1989," and since "money damages will not safeguard women's access to the Center's services," the district court translated its July 22, 1991 preliminary injunction into a permanent injunction.[7] 792 F.Supp. at 169-70. Of those permanently enjoined--Operation Rescue, four other organizations and seventeen named individuals--twelve individuals have appealed to this court. The entry of the permanent injunction mooted Docket No. 91-7801, the appeal from the July 22, 1991 preliminary injunction, and that appeal has been dismissed.

The appeal from the permanent injunction was argued on October 19, 1992. Appellants contend that the district court erred both in finding, as a matter of federal law, that defendants contravened § 1985(3), and in finding, as a matter of state law, that defendants tortiously inter**[1044]**fered with the Center's business. Appellants further contend that the § 1985(3) claim was so wide of the mark that the district court lacked federal question subject-matter jurisdiction and hence was without pendent jurisdiction over any state law claims. The Center, in response, defends both of the grounds on which the district court granted summary judgment in the Center's favor and entered a

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6 Having found in the Center's favor on claims predicated on the intentionality of defendants' conduct, the district court dismissed the Center's negligence claim, a pleading presented as an alternative to the claims sounding in intentionality.

7 We assume--in the absence of any statement to the contrary by the district court--that the district court rested in injunction on both of the claims, federal and state, that it sustained. *See infra* note 12.

permanent injunction.[8] The Center does not seek to bolster its entitlement to the permanent injunction entered in its favor by arguing that the district court erred in dismissing the Center's RICO claim; but the Center does urge that the district court erred in dismissing the state law trespass claim--a dismissal which, the Center argues, turned on the district court's misapprehension that under Connecticut law a tenant, as district from one who has "title," is without standing to sue for trespass.[9]

I.

Although the district court sustained claims both under federal law and under state law, we think it plain that the federal law claim is paramount. The district court's determination with respect to federal law was that the appellants contravened that portion of § 1985(3) which makes actionable a conspiracy whose purpose is to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws...."

A.

The Center's § 1985(3) claim alleged that appellants had conspired to deprive, and had in fact deprived, members of the Center's would-be clientele of two federal rights--the right to an abortion and the right to travel. The Center further alleged that appellants were "motivated by an invidiously discriminatory animus directed at the class of women seeking to exercise their

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[8] The Center also contends that two of the appellants--Joseph M. Scheidler and Randall A. Terry--are without standing to appeal from the permanent injunction because default judgments were entered against them in the district court in 1990 and they did not participate in the proceedings on summary judgment. *See infra* note 13.

[9] *See supra* note 5.

constitutional and legal right to choose abortions and other family planning services." This additional allegation was, evidently, designed to bring the Center's pleading within the § 1985(3) framework crafted by the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971): "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (emphasis in original).

The district court found that appellants were engaged in a conspiracy to abridge the constitutional right to an abortion of women who sought access to the Center and who were barred by appellants' actions from securing the treatment to which they were constitutionally entitled. Recognizing that the constitutional right to an abortion is secured by the Fourteenth Amendment and is, therefore, a right against the state rather than against private persons, the district court concluded that "[d]efendants intentionally frustrated the authorities in their ability and obligation to ensure the women's constitutional rights. Defendants thus caused the violation of the fourteenth amendment by obstructing and preventing the authorities from enforcing women's rights." 792 F.Supp. at 166.

Turning to the motivation for appellants' conduct, the district court further found that appellants "conspired to deprive women, as a class, of their constitutional right to abortion...." *Id.* at 167. The district court concluded that a conspiracy which targets, as a class, women who seek to exercise the abortion right is a conspiracy that satisfies the invidious animus ingredient of § 1985(3). As authority for this conclusion the district court relied on, *inter alia*, this court's opinion in *Terry*, 886 F.2d **[1045]** at 1359 and the Sixth Circuit's opinion in *Volunteer Medical Clinic*, 948 F.2d at 225.

As noted above, the Center alleged that the appellants conspired to effectuate deprivations of two federal rights--the right of women to an abortion and the right to travel. The district court did not explore the Center's second claim: "Having found interference with the constitutional right to abortion, an independent constitutional ground upon which to grant summary judgment on Count I, it is unnecessary to address the arguments regarding the right to travel." 792 F.Supp. at 167-68 n.7

B.

Appellants advance three principal points in support of their view that the district Court's finding of liability under § 1985(3) should be overturned. First, appellants argue that the record does not support the district court's finding that the state was implicated in abridging the abortion rights of the Center's patients. Second, appellants contend that the abortion right is not a "fundamental right," but only a "liberty interest," and hence is not embraced by § 1985(3). Third, appellants urge abandonment by this court of the conclusion, announced in *Terry*, 886 F.2d at 1358-60, that animus against women seeking abortions satisfies the invidious animus ingredient of § 1985(3). For its part, the Center, while undertaking to defend the rationale adopted by the district court, has continued to press its argument that the record would support--indeed, would require--a finding that appellants have conspired to curtail the right to travel of those who have sought treatment at the Center. Reliance on the right to travel has, from the Center's perspective, the substantial advantage that no state involvement need be proved: the right to travel-- a right of national citizenship, not one derivative from the Fourteenth Amendment--is protected against private, as well as against public, interdiction. *Griffin*, 403 U.S. at 105-06, 91 S.Ct. at 1800-01.

II

Subsequent to the filing of briefs and the presentation of oral arguments in this court, the judicial landscape of § 1985(3) was radically altered.

On January 13, 1993, the Supreme Court decided *Bray v. Alexandria Women's Health Clinic, supra.* In *Bray*, nine women's medical facilities located in the northern Virginia/Metropolitan Washington area sought an injunction to restrain Operation Rescue and others from engaging in anti-abortion demonstrations of an obstructive and trespassory character. The district court, finding an interference with the right to travel that was actionable under § 1985(3), granted injunctive relief. *See National Org. For Women v. Operation Rescue*, 726 F.Supp. 1483 (E.D.Va.1989). The Fourth Circuit affirmed. *See NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir.1990) (per curiam). The Supreme Court, speaking through Justice Scalia, reversed. *See Bray*, __ U.S. __, 113 S.Ct. 753. The grounds for reversal were two-fold:

First, the Court concluded that, on the record before it, the plaintiffs had not established the invidious animus ingredient of § 1985(3):

> We said [in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)] that "[t]he language [of § 1985(3)] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators action." 403 U.S., at 102, 91 S.Ct. at 1798 (emphasis in original).
>
> We have not yet had occasion to resolve the "perhaps"; only in *Griffin* itself have we addressed and

upheld a claim under § 1985(3), and that case involved race discrimination. Respondents assert that there qualifies alongside race discrimination, as an "otherwise class-based, invidiously discriminatory animus" covered by the 1871 law, opposition to abortion. Neither common sense nor our precedents support [*sic*] this.

To begin with, we reject the apparent conclusion of the District Court (which **[1046]** respondents make no effort to defend) that opposition to abortion constitutes discrimination against the "class" of "women seeking abortion." Whatever may be the precise meaning of a "class" for purposes of *Griffin's* speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with. This definitional ploy would convert the statute into the "general federal tort law" it was the very purpose of the animus requirement to avoid. *Ibid.* As Justice Blackmun has cogently put it, the class "cannot be defined simply as the group of victims of the tortious action." *Carpenters, supra [Carpenters v. Scott*, 463 U.S. 825 (1983)], at 850, 103 S.Ct., at 3367 (Blackmun, J., dissenting). "Women seeking abortion" is not a qualifying class.

Respondents' contention, however, is that the alleged class-based discrimination is directed not at "women seeking abortion" but at women in general. We find it unnecessary to decide whether *that* is a qualifying class under § 1985(3), since the claim that petitioner's opposition to abortion reflects an animus against women

in general must be rejected. We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex*--for example (to use an illustration of assertedly benign discrimination), the purposes of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law. The record in this case does not indicate that petitioners' demonstrations are motivated by a purpose (malevolent or benign) directed specifically at women as a class; to the contrary, the District Court found that petitioners define their "rescues" not with reference to women, but as physical intervention "'between abortionists and the innocent victims,'" and that "all [petitioners] share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." 726 F.Supp., at 1488. Given this record, respondents' contention that a class-based animus has been established can be true only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect a sex-based intent, or (2) that intent is irrelevant, and a class-based animus can be determined solely by effect. Neither proposition in supportable. __ U.S. at __-__, 113 S.Ct. at 759-60.[10]

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[10] The Court's opinion continued:

> As to the first: Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational
>
> (continued...)

[1047] Second: The Court also concluded that, on the

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[10](...continued)

surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class--as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ---, --- 112 S.Ct. 2791, 2806, 120 L.Ed. 2d 674 (1992).

Respondents' case comes down, then, to the proposition that intent is legally irrelevant; that since voluntary abortion is an activity engaged in only by women, to disfavor it is ipso facto to discriminate invidiously against women as a class. Our cases do not support that proposition. In *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974), we rejected the claim that a state disability insurance system that denied coverage to certain disabilities resulting from pregnancy discriminated on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment. "While it is true," we said, "that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.*, at 496, n. 20, 94 S.Ct., at 2492 n. 20. We reached a similar conclusion in *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 156, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), sustaining against an Equal Protection Clause challenge a Massachusetts law giving employment preference to military veterans, a class which in Massachusetts was over 98% male, *id.*, at 270, 99 S.Ct., at 2291. "'Discriminatory purpose," "we said, "implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*, at 279, 99 S.Ct., at 2296 (citation omitted). The same principle applies to the "class-based, invidiously discriminatory animus" requirement of § 1985(3).

__ U.S. at __-__, 113 S.Ct. at 760-61 (footnotes omitted).

record before it, the plaintiffs had not established that defendants intended to hinder the right to travel:

> Our discussion in *Carpenters* makes clear that it does not suffice for application of § 1985(3) that a protected right be incidentally affected. A conspiracy is not "for the purpose" of denying equal protection simply because it has an effect upon a protected right. The right must be "*aimed at*," 463 U.S., at 833, 103 S.Ct., at 3358 (emphasis added); its impairment must be a conscious objective of the enterprise. Just as the "invidiously discriminatory animus" requirement, discussed above, requires that the defendant have taken his action "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," [*Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979)] so also the "intent to deprive of a right" requirement demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it. That was not shown to be the case here, and is on its face implausible. Petitioners oppose abortion, and it is irrelevant to their opposition whether the abortion is performed after interstate travel.
>
> Respondents have failed to show a conspiracy to violate the right of interstate travel for yet another reason: petitioners' proposed demonstrations would not implicate that right. The federal guarantee of interstate travel does not transform state-law torts into federal offenses when they are intentionally committed against interstate travelers. Rather, it protects interstate travelers against two sets of burdens: "the erection of actual barriers to interstate movement" and "being

treated differently" from intrastate travelers. *Zobel v. Williams*, 457 U.S. 55, 60, n. 6, 102 S.Ct. 2309, 2313, n. 6, 72 L.Ed.2d 672 (1982). See *Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357 (1868) (Art. IV, § 2 "inhibits discriminating legislation against [citizens of other States and] gives them the right of free ingress into other States, and egress from them"); *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 1161, 92 L.Ed. 1460 (1948) (Art. IV, § 2 "insure[s] to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"). As far as appears from this record, the only "actual barriers to movement" that would have resulted from Petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them. That would not be the case here, as respondents conceded at oral argument. __ U.S. at __-__, 113 S.Ct. at 762-63 (footnotes omitted).

A.

By letter dated January 15, 1993, appellants have moved this court "to vacate the permanent injunction and remand with instructions to dismiss the case as it did previously in the earlier appeal [*Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990)]." Appellants rely on *Bray*, which they describe as holding "that 42 U.S.C. § 1985(3) does not provide a fed**[1048]**eral cause of action against persons obstructing access to abortion clinics."

To the extent that appellants are contending that *Bray* forecloses all resort to § 1985(3) in all instances involving "persons obstructing access to abortion clinics," we think appellants have over-read what the Court announced. To be sure, the Court in *Bray* held, with respect to the animus ingredient of § 1985(3), that (1) women seeking abortions do not constitute a class protected by § 1985(3), and (2), if women in general constitute a class protected by the statue--a question the Court found no need to answer-- "the claim that petitioner's opposition to abortion reflects an animus against women in general must be rejected." __ U.S. at __, 113 S.Ct. at 759. But we are of the view that the Court's analysis of the animus aspect of *Bray* is tied to the facts there adduced:--"[t]he record in this case," __ U.S. at __, 113 S.Ct. at 759; "[g]iven this record." *Id.* at __, 113 S.Ct. at 760. Accordingly, we think that an assessment of the animus aspect of the case at bar requires a further review, in the light of the legal principles relating to animus announced in *Bray*, of the record evidence bearing on appellants' motivation.

In similar fashion, a determination of whether appellants intended to and did inhibit a right protected by § 1985(3)--either the Fourteenth Amendment abortion right, protected against the state; or the citizenship right to travel without public or private impediment--calls for scrutiny of the instant record through the prism of the *Bray* Court's pronouncement that "impairment [of the right] must be a conscious objective of the enterprise." __ U.S. at __, 113 S.Ct. at 762.

Since, in the case at bar, (1) the district court's findings with respect to animus require reappraisal, and (2) the district court saw no occasion to make findings on the allegations of interference with the right to travel, we think that the task of revisiting testimony that the district court heard and we did not is best entrusted to the district court. Accordingly, we will

remand this case to the district court for further consideration in the light of *Bray*.[11]

As a corollary of our remand order, we will vacate the permanent injunction.[12] Since the permanent injunction, and the preliminary injunction that it replaced, were products of (1) a construction of § 1985(3),[13] and (2) an attendant balancing of equities, substantially less demanding than that seemingly mandated by *Bray*, we think that vacating the permanent injunction will put the district court in a position to consider the case entirely afresh.[14]

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11 Also, we think that on remand it would be well for the district court to reconsider, in the light of *Carpenters v. Scott*, 463 U.S. 825, 830-34, 103 S.Ct. 3352, 3357-59, 77 L.Ed.2d 1049 (1983), the state involvement aspect of the Center's claim of interference with the abortion right.

12 A question not raised on this appeal, and which we have therefore not addressed, is whether § 1985(3), which expressly contemplates "the recovery of damages," also authorizes injunctive relief. The Court in *Bray* found it unnecessary to address that question "[b]ecause of our disposition of this case." __ U.S. at __ n. 16, 113 S.Ct. at 767 n. 16.

13 As pointed out in note 7, *supra*, we assume that the district court rested its permanent injunction on both the § 1985(3) claim (interference with the abortion right) and the state law claim (tortious interference with business) that it sustained

14 To this end we will vacate the permanent injunction in its entirety. We will not, as the Center would have us do, maintain the injunction in force for Messrs. Terry and Scheidler who, the Center contends, discontinued participation in the proceedings in the district court prior to the summary judgment proceedings and thereby lost standing to appeal. *See supra* note 8; 10 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2690 (1983).

B.

Appellants, in their letter of January 15, ask that our remand order direct that any pendent state claims be disregarded and the case dismissed. Appellants cite this court's disposition of the first phase of this case--vacating the preliminary injunction secured by the Town in 1989, and remanding with directions to dismiss the Town's complaint. 915 F.2d at 104-05--as perti**[1049]**nent authority. But there this court determined that the Town's RICO claim--which was at that stage the only surviving federal claim--was so insubstantial that the district court lacked federal subject-matter jurisdiction and hence was without power to entertain pendent state claims. That determination is not apposite here. What is squarely apposite and, indeed, controlling--is the Court's disposition of the identical request in *Bray*. There, after explaining (1) why the district courts § 1985(3) right-to-travel injunction against petitioners' anti-abortion demonstrations was unwarranted, and, (2) that, as a corollary, the award of attorney's fees and costs to respondents must also be vacated, the Court said:

> Petitioners seek even more. They contend that respondents' § 1985(3) claims were so insubstantial that the District Court lacked subject-matter jurisdiction over the action, including the pendent state claims; and that the injunction should therefore be vacated and the entire action dismissed. We do not agree. While respondents' § 1985(3) causes of action fail, they were not, prior to our deciding of this case, "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. 678, 682-83 [66 S.Ct. 773, 776, 90 L.Ed. 939] (1946), so as to deprive the District Court of jurisdiction.
>
> It may be, of course, that even though the District Court had jurisdiction over the state-law claims, judgment on those claims alone cannot support the

injunction that was entered. We leave that question for consideration on remand. *Bray*, __ U.S. at __, 113 S.Ct. at 768.

Conclusion

For the foregoing reasons, the permanent injunction entered by the district court on May 12, 1992 is vacated[15] and the case is remanded to the district court for further proceedings consistent with this opinion.

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15 In deciding to vacate the permanent injunction and to remand this case to the district court we have not considered whether the Center's evidence establishes a claim under that portion of § 1985(3) which makes it actionable "[i]f two or more persons in any State or Territory conspire to go in disguise on the highway ... for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws.... No such allegation was included in the § 1985(3) count (Count I) of the second amended complaint. No pleading or brief so formulating the Center's § 1985(3) claim was referred to by the district court in its opinion accompanying its disposition of the summary judgment motions and its entry of a permanent injunction. Nor has any such characterization of the Center's contentions been advanced on this appeal.

APPENDIX B

TOWN OF WEST HARTFORD, et al.

v.

OPERATION RESCUE, et al.

No. 2:89 CV 400 (PCD).

United States District Court,
D. Connecticut.

May 12, 1992.

[162]* Pamela R. Hershinson, West Hartford, Conn., and Jon L. Schoenhorn, Hartford, Conn., for plaintiffs.

Vincent P. McCarthy, New Milford, Conn., for defendants.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

DORSEY, District Judge.

This case arises out of protests on June 17 and June 26, 1989 at the Summit Women's Center ("Center") in the West Hartford. Plaintiff, the Center, and defendants, who include Operation Rescue and several of its supporters ("Operation Rescue"), each move for summary judgment.

Background

The following facts are undisputed for purposes of these cross-motions. As a result of the two demonstrations staged by defendants protesting abortions performed at the Center, the Town of West Hartford ("Town") filed the original complaint alleging, *inter alia*, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968, as well as myriad state law claims and seeking declaratory relief. The undisputed facts underlying that complaint are detailed fully in this court's ruling on plaintiff's motion for preliminary injunction dated September 21, 1989, familiarity with which is assumed. A temporary restraining order was granted on June 26, 1989, extended on July 13, 1989. The Center became an intervening plaintiff on August 28, 1989 and filed an amended

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* Bracketed numbers indicate page numbers from decision reported at 792 F.Supp. 161 (D. Conn. 1992).

complaint on September 22, 1989. A preliminary injunction based upon the Town's public nuisance claim was granted after a three-day hearing on September 21, 1989. *Town of West Hartford v. Operation Rescue*, 726 F.Supp. 371 (D.Conn. 1989). The court of appeals reversed for **[163]** lack of federal jurisdiction with respect to the Town and ordered all of the Town's claims dismissed, addressing neither the jurisdictional basis nor the merits of claims set forth by the Center, the sole remaining plaintiff, 915 F.2d 92. Plaintiff now asserts, on its own behalf, a conspiracy by defendants to deprive women of their constitutional rights, both to seek an abortion and to travel, in violation of 42 U.S.C §1985 (Count I); violation of RICO (Count III); as well as state claims of trespass (Count VI), tortious interference with business (Count VIII), and negligence (Count IX). Defendants argue that this court continues to lack subject-matter jurisdiction and that plaintiff has failed, as a matter of law, to set forth any legal or factual basis to support its federal claims.[1]

Discussion

Motions for summary judgment involve a determination as to whether there exists any genuine issue of material fact. That standard is articulated more fully in *Cote v. Durham Life Ins. Co.*, 754 F.Supp. 18 (D.Conn. 1991).

A. *42 U.S.C. § 1985(3) (Count I)*

Plaintiff asserts that defendants have conspired to deprive women of their constitutional right to privacy by interfering with

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[1] In light of defendants' withdrawal of their fifth amendment prerogative, plaintiff's references to defendants' invocation of the fifth amendment and the negative inferences that may be drawn therefrom are disregarded for purposes of these motions.

their right to choose, seek, and obtain abortions. Title 42 U.S.C. § 1985(3) provides, in pertinent part:

> If two or more persons in any State or Territory conspire, . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . [i]n any case of conspiracy set forth in this section, if one or more person engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Thus, a claim under § 1985(3) requires (1) a conspiracy; (2) for the purpose of depriving a person or class of persons of equal protection under the laws or the equal privileges and immunities under the law; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's persons or property, or a deprivation of a right or privilege of a citizen of the United States. *Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 587 (2d Cir. 1988). The statute provides no substantive rights, but "[p]rovides a remedy for a violation of the rights it designates." *Id.*, quoting *Great American Federal Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). Section 1985(3) clearly provides a remedy for conspiracies to deprive persons of their rights under the United States Constitution. *See, e.g., United Bd. of Carpenters v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049

(1983). Defendants maintain that plaintiff's allegation of the deprivation of the right to abortion is not actionable under § 1985, as its underlying constitutional claim -- violation of the fourteenth amendment -- necessitates a concomitant level of state action which plaintiff has failed to allege.[2]

[164] Defendants' argument rests on the premise that, because § 1985 confers no substantive rights but affords a remedy for the deprivation of a constitutional right, the "[r]ights, privileges and immunities that § 1985 vindicates must be found elsewhere." *Scott*, 463 U.S. at 833, 103 S.Ct. at 3358. While § 1985(3) makes no reference to state action and has thus been found to reach wholly private conspiracies, *see Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), the necessity for state action depends on whether the underlying substantive right can only be asserted against state interference. *See New York State NOW v. Terry*, 704 F.Supp. 1247 (S.D.N.Y.), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990). Whether a conspiracy to deprive women of the right to an abortion can be alleged against purely private parties

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[2] Defendants' memorandum, which serves both as an opposition to plaintiffs' motion for summary judgment and as a memorandum accompanying defendants' motion for summary judgment, addresses solely the questions of whether the right to abortion is encompassed by § 1985(3) and whether this case involves the manner of class-based animus anticipated by the statute. In consequence, although plaintiff's memorandum fully discusses each element of § 1985(3) with respect to the constitutional right to abortion, for the purposes of these cross-motions defendants have disputed neither the existence of a conspiracy nor the commission of an overt act in furtherance thereof. Rather, while plaintiff addresses at length the issues of standing and whether women constitute a class for purposes of § 1985(3), defendants' failure to discuss these issues prompts the conclusion that defendants do not dispute these matters and they are not considered herein.

under § 1985(3) is thus dependent upon the constitutional source of that right.

Given the controversial nature of the right in question and its contentious legal and political history, it will come as no surprise to learn that there exists neither uniformity of opinion nor jurisprudential consistency regarding the foundation or derivation of the right to choose abortion in the federal Constitution. In *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 725, 35 L.Ed.2d 147 (1972), the Supreme Court located the right as subsumed by the right to privacy, finding its roots in the first, fourth, fifth, ninth, and fourteenth amendments, as well as in the penumbras of the Bill of Rights. It was noted, however, that the right to privacy, "[w]hether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153, 93 S.Ct. at 727. The subsequent decisional law has overwhelmingly situated the right to privacy within the fourteenth amendment, as suggested but never conclusively established by the Court in *Roe*, thereby affirming the existence of a right that cannot be abrogated by state interference. *See, e.g., Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 2936, 111 L.Ed.2d 344 (1990) ("A woman's decision to beget or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution."); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 521, 109 S.Ct. 3040, 3058, 106 L.Ed.2d 410 (1989) ("This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause."); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427, 103 S.Ct. 2481, 2491, 76 L.Ed.2d 687 (1983) ("In *Roe v. Wade*, the Court held that the 'right of privacy, . . . founded in the Fourteenth

Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.' 410 U.S. at 153, 93 S.Ct. at 727. Although the Constitution does not specifically identify this right, the history of this Court's constitutional adjudication leaves no doubt that 'the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.'"); *Harris v. McRae*, 448 U.S. 297, 312, 100 S.Ct. 2671, 2685, 65 L.Ed.2d 784 (1980) ("The constitutional underpinning of *Wade* was a recognition that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life."); *Maher v. Roe*, 432 U.S. 464, 476, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977) ("This distinction [between direct **[165]** state interference with a protected activity and state encouragement of an alternative activity] is implicit in . . . cases cited in *Roe* in support of the pregnant woman's right under the Fourteenth Amendment."). It is, therefore, reasonable to conclude that the greater body of case law interpreting the constitutional source from which the right to abortion springs locates that right firmly in the fourteenth amendment. *But see Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 10, 1991) (No. 90-1575) ("[W]e observe that *Roe v. Wade* finds support for the existence of personal privacy interests and freedom of personal choice in marriage and family life in the first, fourth, fifth and ninth amendments, as well as in the fourteenth. By their nature, these interests would be meaningless were they to be protected only from interference by the state. We therefore hold that 42 U.S.C. § 1985(3) does not contain a state action requirement where, as here, a plaintiff's claim finds its course in the right announced in *Roe v. Wade*.").

Defendants next argue that plaintiffs has failed to allege state action to deprive women of their right to abortion, an essential component of a fourteenth amendment cause of action. Plaintiff suggests that § 1985(3) compels a measure of state involvement that does not rise to the level of the technical "state action" requirement necessitated by, for instance, 42 U.S.C. § 1983. Again, while there is no apparent consensus regarding the amount of state action mandated by § 1985(3), the Supreme Court has thus far indicated that a clear distinction exists between "state action," as that phrase is understood in the bulk of constitutional jurisprudence, and "state involvement" in private conspiracies pursuant to § 1985(3). *See, e.g., Scott*, 463 U.S. at 833, 103 S.Ct. at 3358 ("The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment. Because that Amendment restrains only official conduct, to make out their § 1985(3) case, it was necessary for respondents to prove that the State was somehow involved in or affected by the conspiracy."). Moreover, "[i]f private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private persons would then have violated § 1985(3)." *Great Am. Federal S. & L. Ass'n v. Novotny*, 442 U.S. 366, 384, 99 S.Ct. 2345, 2355, 60 L.Ed.2d 957 (1978).[3] Here, plaintiff has demonstrated that

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[3] Defendants' citation to case law purportedly supporting the proposition that there is no basis for a "right to abortion" claim under § 1985(3) for lack of state involvement is deceptive and inaccurate. In every case but one, the district court either chose not to reach the issue of state involvement and decided that matter on alternate grounds or found virtually no allegations of state involvement. *See, e.g., New York State NOW v. Terry*, 886 F.2d at 1361 ("[H]aving already found the interference with the right to travel an independent constitutional ground upon which to affirm the district court's § (continued...)

defendants engaged in a deliberate course of conduct designed to frustrate the ability of local law enforcement to provide equal access to medical services to women who choose to exercise the right to an abortion. Defendants do not dispute in their memoranda that they blocked access to the clinic (Defendants' Statement of Material Facts ¶¶6-12); that they refused to leave despite **[166]** having been asked to do so by plaintiff's employees (¶7); that they refused to notify police of the date of their demonstrations (¶5); that they went "limp" when arrests were attempted (¶10); that many of them failed to identify themselves to police (¶11); and that all patients were denied treatment at plaintiff's facility on June 17, 1989, the date of the second protest (¶19). Defendants' efforts clearly prevented and hindered the state from providing and assuring equal access to all members of the public to select and receive abortions, a constitutionally protected and preserved right. Defendants intentionally frustrated the authorities in their ability and obligation to ensure the women's constitutional rights.

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[3](...continued)

1985(3) holding, it is unnecessary to rule on [the right to obtain an abortion] claim."); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 681 F.Supp. 688 (D.Or. 1988) (There is no allegation of state action in plaintiffs' complaint; no facts from which state action can be inferred; no assertion by plaintiffs that state action is in any way involved."); *NOW v. Operation Rescue*, 726 F.Supp. 1483, 1494 (E.D.Va. 1989), *cert. denied sub nom., Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991) ("[G]iven that there is another independent basis for relief under Section 1985(3), the Court concludes that it is unnecessary and imprudent to venture into this thicket. Courts should avoid constitutional questions where other grounds are available and dispositive of the issues presented."); Only in *Roe v. Operation Rescue*, 710 F.Supp. 577 (E.D. Pa. 1989), *aff'd*, 919 F.2d 857 (3d Cir. 1990), did the district court find that defendants' protest activities did not satisfy the state involvement requirement, although the court declined to discuss what activities might fulfill this specification.

Defendants thus caused the violation of the fourteenth amendment by obstructing and preventing the authorities from enforcing women's rights. Plaintiff has shown ample involvement by the state, even if the result was not the state's intention, in accordance with the Supreme Court's articulation of that principle in both *Novotny* and *Scott*. The right to obtain an abortion is thus not only actionable under § 1985(3), but defendants here have violated that right by the intended effect of their actions on the state, i.e., the denial of women's constitutional right.

Defendants propose, in the alternative, that § 1985(3) provides a remedy solely for the violation of fundamental rights and that abortion is merely a "liberty interest." Little time need be dedicated to defendants' thoroughly tendentious arguments in this regard.[4] *Roe v. Wade* explicitly established that the right to abortion is not only "fundamental," but is "implicit in the concept of ordered liberty." 410 U.S. at 152, 93 S.Ct. at 726. The Court has gone on to affirm this principle in various contexts. *See, e.g., Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 781 n. 11, 106 S.Ct. 2169, 2189, n. 11, 90 L.Ed.2d 779 (1986) ("[T]hese cases deal] with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental' and as being dignified by history and tradition."); *Akron*, 462 U.S. at 427, 103 S.Ct. at 2491 ("[T]he Court in *Roe* acknowledged that the woman's fundamental right 'is not unqualified and must be considered against important state

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[4] Defendant's truly presumptuous assertions that the Supreme Court has now "properly determined" that the right to abortion is a mere liberty interest and that the right has been "demoted" from its former status, coupled with their continuing citation to dissenting opinions by justices who "are now in the majority" is not only not appreciated, but it is unsound legal hypothesizing and falsely states existing law.

interests in abortion.... But restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest."). Moreover, in *Webster*, 492 U.S. at 520, 109 S.Ct. at 3058, the Court declared that "[t]here is wisdom is not unnecessarily attempting to elaborate the abstract differences" between fundamental rights and liberty interests. While it is difficult to dispute that Supreme Court jurisprudence confronting the abortion question has undergone an evolution permitting successively greater restrictions on the right to choose, *Roe v. Wade* is still the law of the land and the legal framework and precepts expressed therein have not been overruled to date. Thus, this court will adhere to the principles formulated in that case resolutely establishing the right to abortion, whatever its genesis, as a fundamental right guaranteed by the Constitution. It is unquestionable that § 1985(3) provides a remedy for the violation of constitutional rights. The right to an abortion, again, surely falls squarely within this category and is thus actionable under the statute.

Defendants further submit that a conspiracy to deter women from having abortions does not involve the kind of class based animus required by § 1985(3).[5] In **[167]** support of this

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[5] Defendants' use of the word "amicus" where the word "animus" properly belongs suggests that counsel would do well to look up these words in the dictionary. Moreover, defendants' indifference in failing to brief the issue of class based animus under § 1985(3), instead referring the court to an attached amicus brief of the United States in a different case without so much as identifying a page number on which the referenced argument can be found, with no request for permission to file an amicus brief, prompts the disregard of the issue as not properly briefed. The court takes extremely seriously its role in adjudicating a dispute such as this and consequently expends a tremendous amount of time in the process. It is simply beyond belief that defendants would not have felt it to be worth the effort to write a few lines on this matter rather than borrow

(continued...)

contention, defendants maintain that their intent is to prevent abortions,[6] not to discriminate against women, and further that the presence of women defendants precludes a finding of class-based animus. Plaintiff argues that defendants' "real" target, preventing abortion, ignores the fact that only women seek abortions and that defendants thus would deprive women of a constitutionally protected right.

A primary purpose of § 1985(3) is not simply to accord an intangible, abstract protection to the targeted class, but to ensure members of the class the meaningful exercise of their individual rights. *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218, 225 (6th Cir.1991). "By its very language § 1985(3) is necessarily tied to evolving notions of equality of and citizenship. As conspiracies directed against women are inherently invidious and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act." *New York State Now v. Terry*, 886 F.2d at 1359. *See also Cousins v. Terry*, 721 F.Supp. 426, 430 (N.D.N.Y.1989) ("[W]omen seeking abortions constitute a class entitled to protection under § 1985(3), and . . . a conspiracy to deprive women seeking abortions of the equal protection of the laws and the equal privileges and immunities of national citizenship is actionable under § 1985(3).").

Defendants' argument that their actions are directed against an activity, or only a "subgroup" of

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[5](...continued)

another's work. If counsel cannot sense or comprehend the obligation to aid the court in its search for the applicable law, one would think the client deserved the most thorough and effective presentation achieved by following the rules.

[6] Specifically, defendants declare that their purpose was "the goal of rescuing babies who were scheduled to be killed." Defendants' Statement of Material Facts, ¶ 4.

> women rather than women in general, is insufficient to escape the scope of § 1985(3).... It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them.

New York State NOW v. Terry, 886 F.2d at 1361. It is equal sophistry for defendants to assert either that they seek to deter all "people" who receive abortions, whether or not they are women, or that they cannot possess an invidious class-based animus against women due to the fact that some of the defendants are women. Any attempt to prevent the exercise of this constitutionally protected right is by definition an attempt to deprive women — and only women —of that right. See *New York State NOW v. Terry*, 961 F.2d 390, 395 (2d Cir.1992) ("These issues [including whether actions directed at the prevention of abortions did not amount to the class-based animus required for a violation of § 1985(3)] are therefore settled in this circuit, absent reconsideration en banc or a different ruling by the Supreme Court."). Moreover, defendants fail to explicate, nor does their "amicus brief," their conclusory assertion that women can never act in a discriminatory manner toward other women. Absent any such discussion, beyond the bald assertion, there is no reason to credit defendants' assumption. The presence of women as defendants in this case does not preclude the conclusion, otherwise uncontroverted in the record, that defendants conspired to deprive women, as a class, of their constitutional right to abortion in contravention of § 1985(3). Accordingly, plaintiff's motion for summary judgment on Count I is granted.

[168] B. *18 U.S.C. § 1961, RICO (Count III)*

Plaintiff's other federal claim is asserted pursuant to 18 U.S.C. §§ 1961-1968, RICO, which directs plaintiff to satisfy

two pleading burdens. "First, plaintiff must assert that the defendant has violated 18 U.S.C. § 1962 (1988), the substantive RICO statute." *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 100 (2d Cir.1990). This requires:

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate commerce.

Id., quoting *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984). Plaintiff must further allege that he was injured in his business or property by reason of a violation of § 1962. *See id.* Here, plaintiff alleges that defendants, acting as an enterprise, through their pattern of demonstrations, sought to obtain the termination of the Center's performance of abortions, a form of extortion as defined by the Hobbs Act, 18 U.S.C. § 1951(b)(2). Defendants respond that plaintiff has failed to demonstrate that defendants constitute an "enterprise affecting interstate commerce" within the RICO statute; that defendants committed any acts of extortion as defined by the Hobbs Act; or that plaintiff was injured in its business or property due to defendants' alleged extortion.[7]

Defendants contend that they do not constitute an enterprise and that their activities do not constitute RICO offenses, largely on the grounds that they neither exist for nor are engaged in profit making. The Second Circuit, considering

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[7] Defendants have not discussed the alleged "commission of two or more acts" constituting a "pattern" in their opposition to the RICO claim. As neither argued nor briefed, defendants are held not to have disputed that their activities constituted a "pattern."

these issues in tandem in the context of criminal RICO convictions, has found that there must be some financial purpose to either the enterprise or to the acts of racketeering. *See United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert denied*, 474 U.S. 841, 106 S.Ct. 124, 125, 88 L.Ed.2d 102 (1985); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840, 104 S.Ct. 133, 134, 78 L.Ed.2d 128 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). This economic component, moreover, need not be significant or primary. *See Ferguson*, 758 F.2d 843. Plaintiff argues that defendants have an economic motive--as distinguished from a profit-making motive--in their actions. Plaintiff points to the fact that defendants, both individually and collectively, raise funds to carry on their cause and support their organizations. Plaintiff further notes that defendants seek to extort from and deny to the Center an economic benefit or opportunity--that is, to force plaintiff, through obstruction, intimidation, and fear, to shut down. While plaintiff has clearly demonstrated that it has suffered economic consequences due to defendants' actions, this is not the type of financial loss that the Second Circuit has construed the RICO statute to require. Defendants may seek and receive donations from supporters, perhaps even in direct response to defendants' strategies and tactics such as those employed with respect to plaintiff, but their clearly expressed purpose is to stop the performance of abortions, not to make money. Nor does the record indicate that they seek the termination of plaintiff's business for an economic goal; rather, their overarching motivation has been to stop plaintiff from performing abortions. Plaintiff's citation to *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989), provides a novel contrast to the **[169]** interpretive boundaries placed on RICO in

this circuit.[8] However, this court is bound by the narrower construction of RICO suggested by the approach adopted by the Second Circuit when confronted with the criminal RICO statute. Accordingly, because plaintiff has not established that the purpose of defendants' activities was sufficiently economic in nature, defendants' motion for summary judgment on Count III is granted.

C. *Trespass (Count VI)*

Count VI alleges defendants' trespass upon the Center's property by force during the demonstrations in question. To state a claim for trespass under Connecticut law, plaintiff "[m]ust prove possession, title and the absence of actual exclusive possession by another." *Lake Garda Improvement Ass'n v. Battistoni*, 160 Conn. 503, 517, 280 A.2d 877 (1971). *See also Barrs v. Zukowski*, 148 Conn. 158, 165, 169 A.2d 23 (1961) ("Title is an essential element in plaintiff's case, where an injunction is sought to restrain a trespass."). Here, plaintiff seeks an injunction to prevent defendants' continuing trespass upon the Center's premises. Plaintiff neither alleges nor demonstrates that it holds title to the grounds in question and thus fails, as a matter of law, to establish a claim for trespass. Defendants' motion for summary judgment on Count VI is granted.

D. *Tortious Interference With Business (Count VII)*

Count VII alleges the tortious interference with plaintiff's business expectations by defendants. Defendants maintain that

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[8] In *McMonagle*, the Third Circuit found that anti-abortion activists' efforts to shut down a clinic in which abortions were performed constituted an attempt to extort from the clinic its right to continue operating its business through methods of fear, intimidation, and coercion. 868 F.2d at 1342.

plaintiff has failed to show a causal nexus between the claimed tortious behavior and any losses to plaintiff and has also failed to establish or allege any actual losses of anticipated profits. In order to succeed on a claim of tortious interference with business expectancies under Connecticut law, plaintiff must not only show that defendants' actions proximately caused a loss to plaintiff's business, but also that defendants were guilty of fraud, misrepresentation, intimidation, or molestation. *Sportsmen's Boating Corp. v. Hensley*, 192 Conn. 747, 754, 474 A.2d 780 (1984). In addition, the tort of interference is not complete absent some actual damage. *Bowman v. Grolsche Bierbrouwerij B.V.*, 474 F. Supp. 725 (D.Conn. 1979). Here, plaintiff has established without contradiction, that defendants through intimidation, sought to interfere with plaintiff's business of providing medical care and abortion services to patients. Plaintiff's offices were closed for several days due to defendants' actions. Plaintiff sustained property damage and thus damage to its business, when defendants entered its premises. Accordingly, plaintiff's motion for summary judgment on Count VII is granted.

E. *Negligence (Count VIII)*

In Count IX a claim of negligence is alleged. Plaintiff states that its negligence claim is an alternative theory of liability should defendants be found not to have acted intentionally or willfully. Because defendants are found to have acted intentionally with respect to several counts of the complaint, Count VIII is, accordingly, dismissed.

F. *Permanent Injunction*

In order to obtain a permanent injunction, "a party must show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." *New York State NOW v. Terry*, 886 F.2d at 1362, citing *Rondeau v. Mosinee Paper*

Corp., 422 U.S. 49, 57, 95 S.Ct. 2069, 2075, 45 L.Ed.2d 12 (1975). As found previously in its ruling on motion for preliminary injunction, dated July 22, 1991, the ability of plaintiff to continue to render services to women is compromised by defendants' conduct, particularly in view of the fact that defendants, when asked, have uniformly refused to disavow repetition of the activi**[170]**ties of April 1, 1989 and June 17, 1989. Irreparable harm will, therefore, result if the injunction already in place is not continued and enforced.

Further, money damages will not safeguard women's access to the Center's services; only injunctive relief can assure such access. Moreover, the narrowly-tailored, content-neutral nature of the injunction sought by plaintiff does not infringe defendants' exercise of their first amendment right. *See New York State NOW v. Terry*, 886 F.2d 1339.

Accordingly, it is ordered that defendants Operation Rescue, Joseph Scheidler, Randall A. Terry, Project Life, Inc., Connecticut Pro-Life Action Network, John Kladde, John Charles Grant, Eileen M. Haggerty, Jean Pollock, Catherine Jersey, Lillian A. Loughlin, William Calvin, William P. Cotter, Hjalmar Syverson, Dolores M. Teleski, Jayne C. Tuller, John Doe(s) and Jane Doe(s), Massachusetts Pro Life Action Network, Bi-State Operation Rescue Network, John Kenshaw, Thomas J. Herlihy, Robert E. Cooley and Lawrence Dolan shall not, unless excused by further order of this court, enter or remain upon or in the property or offices of Summit Women's Center; Physically block, obstruct or otherwise impede access, either by ingress or egress, to the property or offices of the Summit Women's Center, either by themselves, individually, or in conjunction with others; or directly aid, abet, counsel, procure, arrange, encourage, or assist any other person to perform the actions above set forth.

This order shall be binding only upon the above-named defendants and their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them, or any one or more of them who receive actual notice of this order by personal service or otherwise. This injunction shall also be applicable to any address to which the Summit Women's Center should relocate in the future.

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment (document #341) is granted as to Counts I and VII. Defendants' motion for summary judgment (document #358) is granted as to Counts III and VI. Count VIII is dismissed. A permanent injunction, as described herein, shall issue.

SO ORDERED.

APPENDIX C

TOWN OF WEST HARTFORD,
a municipal corporation located in the State of Connecticut, Plaintiff-Appellee,

v.

OPERATION RESCUE, Joseph M. Scheidler, Randall A. Terry, Project Life, Inc., Connecticut Pro-Life Action Network, John Kladde, John Charles Grant, Eileen M. Haggerty, Jean Pollock, Spear Printing Company, John M. Spear, Catherine A. Jersey, Maria D. Garvey, Lillian A. Loughlin, William A. Calvin, William P. Cotter, Hjalmar Syversen, Faithful and True Roman Catholics, John Doe(s) and Jane Doe(s), Defendants.

Appeal of OPERATION RESCUE, Randall A. Terry, Project Life, Inc., Lillian A. Loughlin, John Charles Grant, Eileen M. Haggerty, Jean Pollock, Spear Printing Company, John M. Spear, Catherine A. Jersey and Hjalmar Syversen, Defendants-Appellants.

Nos. 979 to 981, Dockets 89-9051 89-9053 and 89-9055

United States Court of Appeals,
Second Circuit.

Argued March 12, 1990
Decided Oct. 10, 1990.
As Amended on Denial of
Rehearing Dec. 26, 1990.

[93]* Joseph P. Secola (George J. Mercer, The Rutherford Institute of Connecticut, Milford, Conn., of counsel), for defendants-appellants Randall A. Terry, Operation Rescue and Project Life, Inc.

Vincent P. McCarthy, New Milford, Conn., for defendants-appellants Lillian A. Loughlin, John Charles Grant, Eileen M. Haggerty, Jean Pollock, Spear Printing Co., John M. Spear, Catherine A. Jersey, and Hjalmar Syversen.

Patrick G. Alair, Asst. Corp. Counsel, Town of West Hartford, West Hartford, Conn., for plaintiff-appellee Town of West Hartford.

Nancy J. Gannon, George W. Koch, Jr., Milwaukee, Wis., for amicus curiae Catholic League for Religious and Civil Rights.

Before KEARSE, CARDAMONE and MAHONEY, Circuit Judges.

MAHONEY, Circuit Judge:

This appeal is taken from a preliminary injunction barring defendants-appellants[1] from entering or remaining upon the property or offices of the Summit Women's Center (the

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* Bracketed numbers indicate page numbers from decision reported at 915 F.2d 92 (2d Cir. 1990).

1 Defendants John Kladde, William A. Calvin, and William P. Cotter, although enjoined have not appealed. Defendants-appellants, Randall A. Terry, Project Life, Inc., Eileen M. Haggerty, Spear Printing Company, and John M. Spear have appealed although not enjoined. Their authority to do so is dubious. *See Sage v. Central R.R.*, 99 U.S. 334, 346, 25 L.Ed. 394 (1878). In view of the disposition of this appeal, however, the issue is academic.

"Center") in the Town of West Hartford, Connecticut, or impeding access thereto. The district court found that such activities had occurred on April 1 and June 17, 1989 for the purpose of impeding the performance of abortions at the Center.

The preliminary injunction was premised upon a pendent state law claim of public nuisance. The only basis for federal jurisdiction was a claim that defendants violated Title 18, part 1, chapter 96 of the United States Code, entitled "Racketeer Influenced and Corrupt Organizations" ("RICO"), specifically 18 U.S.C. § 1962 (1988), through predicate acts of extortion violative of the Hobbs Act, 18 U.S.C. § 1951 (1988).

Concluding that plaintiff-appellee the Town of West Hartford (the "Town") has not asserted a colorable basis for federal jurisdiction, we vacate the preliminary injunction and remand with instructions to dismiss the complaint.

Background

A. Findings of the District Court.

We draw our factual summary from the district court's findings of fact, set forth in *Town of West Hartford v. Operation Rescue*, 726 F.Supp. 371, 373-75 (D.Conn.1989).

This case arises from demonstrations conducted at the Center, which is a health **[94]** care facility that provides medical services, including abortions, to women. The Center shares occupancy of a building within a shopping center at 345 North Main Street, West Hartford, Connecticut with several other businesses, including medical and dental offices.

On April 1 and June 17, 1989, large groups of demonstrators gathered outside the Center to protest its abortion practices. The demonstrators picketed, distributed leaflets, and

attempted to persuade women not to enter the Center or to have abortions. Among the demonstrators were certain individuals--termed "rescuers" by the district court--who, as part of the protests, entered and/or blocked the offices of the Center in order to close down the Center and prevent the performance of abortions. During each protest, rescuers occupied the Center for the entire business day, despite demands that they leave by Center employees, an employee of the landlord, and the West Hartford police. Elevators were disabled, and access impeded both within and to the Center, as well as to other facilities within the building. During the April 1 protest, patients entering the Center and its treatment rooms encountered a "gauntlet" of rescuers who urged the patients not to have abortions. The June 17 protest prevented the treatment of any patients at the Center that day. A receptionist at the Center had an anxiety attack on June 17, and four Center employees quit their jobs, citing their fear of the protests.

Approximately forty police officers from the Town responded to the scene on both occasions, together with an ambulance and paramedic team under contract with the Town. The ambulance and paramedics were also on hand when arrestees from the demonstrations were processed at a local court. Members of the Town fire department were summoned on April 1 to separate five rescuers who had used locks to fasten themselves together.

Large numbers of people were arrested at both protests: sixty-one on April 1, and two hundred sixty-one on June 17. They were charged with criminal trespass, interfering with a police officer, and refusal to be processed. The latter charges were premised upon the demonstrators' passive resistance (*i.e.*, their refusal to walk or display identification after being arrested).

In the words of the district court, "[t]he demonstration and rescue was organized, prepared, and orchestrated." 726 F.Supp. at 374. On both occasions, persons described as "negotiators" gave instructions to the arrested persons and told officials that they were authorized to speak for the arrestees. The negotiator on April 1 was a man known only as "Bill." The negotiator on June 17 was defendant William A. Calvin.

The district court further stated that "[t]here appears to be a substantial association of people who are committed to eliminating the availability of abortions. The association appears to be loose and not formed.' 726 F.Supp at 375. Groups have associated under the names "Connecticut Pro-Life Action Network," "Faithful and True Roman Catholics," and "Operation Rescue." *Id.* Defendant-appellant Randall A. Terry "proclaims a role" in the latter organization, which, like the other groups named, was not shown to have a legal status.

Defendants John Kladde, John Charles Grant, Catherine A. Jersey, William A. Calvin, William P. Cotter, Hjalmar Syversen, Lillian A. Loughlin and Jean Pollock were "all shown to have been personally involved as rescuers." *Id.* "An individual named Haggerty was involved, but not clearly identified as Eileen Haggerty, the named defendant." *Id.*

B. The Complaint and RICO Case Order.

On June 29, 1989, the Town commenced the present action against the named defendants. In addition to asserting a RICO claim pursuant to 18 U.S.C. § 1962 (1988) based upon predicate acts of extortion in contravention of 18 U.S.C. § 1951 (1988), the complaint alleged a conspiracy to deprive civil rights in violation of 42 U.S.C. § 1985(3) (1982), and various pendent state **[95]** claims, including public nuisance. The jurisdictional statement of the Town's complaint read as follows:

The Court has subject matter jurisdiction under 28 U.S.C. Section 1331, 28 U.S.C. Sections 1343 and 2201, 18 U.S.C. Section 1964, 15 U.S.C. Sections 21 and 26, 42 U.S.C. Section 194, and the principles of pendent jurisdiction.

28 U.S.C. § 1331 (1988) confers original jurisdiction upon federal district courts as to "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1343 (1988) confers such jurisdiction as to certain civil actions regarding civil rights and the elective franchise. 28 U.S.C. § 2201 (1988) authorizes any federal court to render declaratory judgements in any "case of actual controversy within its jurisdiction." 18 U.S.C. § 1964 (1988) vests jurisdiction in the district courts to grant civil remedies for violations of 18 U.S.C. § 1962 (1988). 15 U.S.C. §§ 21 and 26 (1988) deal with enforcement of the federal antitrust laws. 42 U.S.C. § 194 (1982) requires the Secretary of Health and Human Services to furnish sufficient quarters for the work of the Children's Bureau, a component of the Department of Health and Human Services, at an annual rental not to exceed $2,000.

In its opinion, the district court stated that the Town's "announced intention to withdrawn its § 1985 claim ... leaves the RICO claim as the sole basis for federal jurisdiction over this action." 726 F.Supp. at 376. The announcement occurred in a document filed by the Town on August 25, 1989, in response to a series of inquiries in a RICO Case Order entered by the district court. The Town's brief on appeal confirms that "[b]y amended complaint dated December 6, 1989, the Town abandoned its state and federal civil rights claims."

In addition, we note that a motion by the Center to intervene in this case was granted August 28, 1989, after the preliminary injunction hearing, but the decision from which this appeal is taken addressed preliminary relief "only as a question

of entitlement of the [Town]." 726 F.Supp. at 373 n.1. The Town's amended complaint did drop its claim under 42 U.S.C. § 1985 (1988), but made no substantial change to its RICO claim. In addition, the Center was added as a plaintiff suing under RICO on its own behalf and on behalf of a class of similarly situated abortion facilities nationwide. Like the Town's claim, the Center's RICO claim was grounded on predicate Hobbs Act violations, but the Center's theory of extortion significantly differed from that of the Town. We do not address whether the Center has adequately invoked federal jurisdiction, because it is fundamental that an intervening claim cannot confer subject matter jurisdiction over the action it seeks to join. *See Pressroom Unions-Printers league Income Sec. Fund v. Continental Assurance Co.*, 700 F.2d 889, 893 (2d Cir.) ("The longstanding and clear rule is that 'if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a plaintiff with a sufficient claim.'") (quoting *Pianta v. H.M. Reich Co.*, 77 F.2d 888, 890 (2d Cir. 1935)), *cert. dismissed*, 463 U.S. 1233, 104 S.Ct. 26, 77 L.Ed.2d 1449 *cert. denied*, 464 U.S. 845, 104 S.Ct. 148, 78 L.Ed.2d 138 (1983); *see also* 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1917, at 457 (2d ed. 1986) ("Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action.").

The upshot of all the foregoing is that we address the question of subject matter jurisdiction in terms exclusively of the Town's RICO claim. That claim, set forth as the first count of the Town's complaint, incorporates by reference the preceding jurisdiction and factual allegations, and then states in full:

> 82. The defendants have participated in and have conducted a series of activities, as alleged, that include predicate offenses in violation of 18 U.S.C. Section 1951 (the Hobbs Act) that constitute a pattern of "racketeering" activities under 18 U.S.C. Section

1961(1), in that their acts and conduct involve threats, extortion, interference with business and property interests, obstructions of justice, obstruction of local law enforcement and acts that are indictable under 18 U.S.C. Section 1951 (the Hobbs Act), and 18 U.S.C. Section 1961.

83. The defendants have conspired to commit and engaged in a pattern of extortionate acts, as defined under the Hobbs Act, in West Hartford and elsewhere, and those acts have caused injury to the governmental functions and property of the plaintiff, including, without limiting the foregoing, the creation of a severe restriction of [sic] upon the ability of the West Hartford Police Department **[96]** to provide police protection for its citizens, the deprivation of medical services from clients of the Summit Women's Center, the deprivation of individuals' freedom to operate and/or patronize other businesses on the premises, extraordinary overtime costs and injury to one police officer employed by plaintiff, for which injury the plaintiff has been forced to expend sums as injury pay, medical costs and expenses and other benefits for which the plaintiff is responsible under Connecticut General Statutes § 31-293 and under which statute the plaintiff is given a statutory right of recovery.

84. The actions of the defendants, aforesaid, imperiled public safety, peace and order.

85. The defendants aforesaid, both as enterprises under 18 U.S.C. Section 1961(4) and as individuals, engaged in a pattern of racketeering activity, have crossed state lines through travel to organize, train, conspire and take action in furtherance of an illegal conspiracy, through the use of interstate telephone lines and U.S. mail services, through the interference with interstate

> commerce, and such actions were intended and designed to cause fear and threat of violence, to imperil public safety, peace and good order in West Hartford through the use and threat of fear and threat of violence, against both citizens and residents of other states and communities in the United States of America visiting West Hartford.
>
> 86. The actions of the defendants, aforesaid, have resulted in direct economic injury, both tangible and intangible, to the plaintiff.

The complaint earlier details the alleged activities deemed to constitute the predicate acts underlying the RICO claim. The allegations portray an expansive, well organized network spurring abortion protests in various parts of the United States, and recount specific instances of organized protest. The complaint also describes the alleged activities at the Center on the dates in question, and identifies those actions of the defendants that the Town characterizes as "extortionate." As to the events of April 1, it states:

> 59. [At the Center] the defendants, or some of them, acting in concert with others, deliberately and maliciously employed techniques designed to slow the West Hartford Police Department in its efforts to remove them from [the Center and the surrounding property], including resisting arrest by passive and active methods such as going limp or struggling to avoid being handcuffed, locking themselves together with Kryptonite bicycle/motorcycle locks and refusing to walk from the Summit Women's Center to waiting police vehicles or to identify themselves.
>
> 60. At [the Center and the surrounding property] the defendants, or some of them, acting in

> concert with others through the defendant John Kladde, who was identified by the protesters' negotiator as their leader, deliberately and maliciously sought to extort concessions for the West Hartford Police Department regarding the type and number of charges to be filed against those arrested, as well as the punishment to be sought in connection with those charges in exchange for cooperation in providing keys for the Kryptonite locks by which five protesters were bound together within the premises of [the] Center . . . .
>
> 61. [At the Center] the defendants, including John Charles Grant, acting in concert with others, deliberately and maliciously determined further to harass and extort [the Town] by refusing to identify themselves such that they could not be released pending arraignment unless charges against them were reduced or dropped, with the result that extraordinary manpower was needed to control arrestees in a courtroom from Saturday, April 1 through Monday morning, April 3, 1989.

It is further alleged that (1) several defendants "deliberately and maliciously sought to extort a less diligent response to future protests by falsely indicating to newspaper reporters that the West Hartford Police Department had beaten protesters with clubs"; (2) several defendants, "acting in concert with others, deliberately and maliciously commenced and encouraged a campaign of telephone and mail harassment" against the Town "in deliberate efforts to extort a less diligent police response to future protests at the [Center] and elsewhere in the [Town]"; (3) "defendant Spear Printing Co., Inc., through its editor, the defendant John M. Spear, deliberately and maliciously published an incorrect, defamatory account of the April 1, 1989 protest ... in furtherance of the efforts of the defendants and others to harass, intimidate and extort a less diligent or softened response from the West Hartford **[97]** Police

to future protest activities" at the Center and elsewhere within the Town; (4) the activities described forced the Town to "divert a large number of its on-duty police officers to [the Center] and subsequently to monitor arrestees and assist in their arraignment, resulting in reduced police protection for the residents of the Town, and incurred expenses in excess of $11,000 in personnel and other costs"; and (5) defendant Jean Pollock, speaking for defendant Connecticut Pro-Life Action Network, held a press conference outside the headquarters of the West Hartford Police Department in which she "deliberately and maliciously sought to intimidate the West Hartford Police Department into softening its response to future protests by publicizing a false and distorted view of the police response to [the April 1 protest]."

The complaint also details the events surrounding the protest that took place June 17, 1989, at which defendants allegedly attempted to "prevent [the Center] from performing abortions on that day and in the future by extortionate means." It states that several defendants, "acting in concert with others[,] deliberately and maliciously employed, and/or directed others to employ, techniques designed to slow the West Hartford Police Department in its efforts to remove them from the property ..., including resisting arrest by passive and active means such as going limp or struggling to prevent being handcuffed." It also states that defendant William Calvin "deliberately threatened the Town" by "indicating that there could be even larger protests in the future unless the police approach changed." It is further alleged that:

> defendants, or some of them, acting in concert with others, deliberately and maliciously determined further to harass and extort the West Hartford Police Department by refusing to identify themselves unless charges against them were reduced or dropped such that police were forced to house them in two courtrooms from Saturday, June 17, 1989, through Monday, June

19, 1989, and to expend extraordinary efforts to handle them, estimated to have cost the Town between $20,000 and $30,000.

The Complaint goes on to describe another "telephone and mail campaign of harassment and intimidation" to "complain about police conduct during the June 17, 1989 protest based upon inaccurate information regarding the incident in a deliberate and malicious effort to obtain a softened response to future protests in furtherance of their cause." Finally, after alleging that the arraignment of the uncooperative June 17 arrestees "took almost twelve hours to accomplish and required the assistance of large numbers of police and State of Connecticut Department of Corrections personnel," the Complaint states:

> On or about Saturday, June 24, 1989, the defendant Faithful and True Roman Catholics published a paid advertisement in *The Hartford Courant* which deliberately, maliciously and falsely stated that "[o]ne priest was badly beaten" and that police officers were violent at the protest of June 17, 1989, and which advertisement exhorted readers to demand investigations into the conduct of West Hartford police by the Governor, State's Attorney and state legislators in an effort to perpetuate the extortionate efforts of defendants to elicit a reduced response from police to future criminal acts of the defendants and others acting with them.

On July 5, 1989, the district court issued a "RICO Case Order" consisting of a series of inquiries to which the Town was required to respond "in detail and with specificity." The Town submitted its response on August 25, 1989. The order and response included the following exchanges:

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

> a. List the alleged predicate acts and the specific statutes which were allegedly violated. . . . [*Response*] The predicate acts upon which plaintiff's RICO claim are based consist primarily of incidents of extortion in violation of 18 U.S.C. Section 1951(a), commonly known as the Hobbs Act.
>
> b. Provide the dates of the predicate acts, the participants in the predicate **[98]** acts and a description of the facts surrounding the predicate acts. . . . [*Response*:] The acts of the defendants have occurred on numerous dates commencing prior to 1986 and continuing through the present. Several dates upon which the actions of the defendants and/or some of them have occurred in West Hartford are April 1 through April 3, 1989, April 4, 1989, April 17, 1989, June 17 though 19, 1989 and June 24, 1989. These dates correlate to the dates of the April 1, 1989 and June 17, 1989 "rescues" at the Summit Women's Center, the continuing incarceration of the protesters arrested at those protests by the West Hartford Police Department and the subsequent press statements/news conferences held by the protesters regarding their past threatened future actions.
>
> f. Describe how the predicate acts form a "pattern of racketeering activity". . . .[*Response*:] The definition of "racketeering

activity" contained in 18 U.S.C. Section 1961(1) specifically includes violations of 18 U.S.C. Section 1951 (the Hobbs Act). Operation Rescue, as well as the other named defendants acting in conjunction with others, have repeatedly extorted or attempted to extort from providers of abortion services a closure of their facilities. In addition, the defendants have attempted to extort, on repeated occasions, softened police response to their criminal actions in furtherance of their goal of closing abortion facilities. These extortionate activities are a part of the defendants' well-organized efforts to prevent abortions from taking place anywhere in this country.

15. Describe the alleged injury to business or property.

[Response:] The primary injuries caused to the plaintiff by the enterprise is the hinderance [sic] of normal routine police activities within the Town of West Hartford as well as the cost of increased manpower and equipment needed to respond to the illegal activities conducted by the enterprise within the Town of West Hartford. In addition, the enterprise has resulted in injury to at least one police officer, albeit minor, within the Town of West Hartford for which the plaintiff may be liable.

16. Describe the direct casual [sic] relationship between the alleged injury and the violation of the RICO statute. *[Response:]* The plaintiff Town of West Hartford is, in effect, an innocent bystander which has been injured as a direct result of the Operation Rescue efforts to shut down the Summit Women's Center in West Hartford. The goal of Operation Rescue is, in

part, to prevent police response to Operation Rescue activities from being effective. As a result, increased manpower is needed to deal with Operation Rescue-sponsored protests as is a correlative reduction in police protection for the balance of the Town.

C. The Preliminary Injunction.

On July 10, 1989, soon after the issuance of the RICO Case Order, the Town submitted to the district court an application for a preliminary injunction restraining defendants from *inter alia:* entering any facility "providing abortion services within the Town"; blocking, impeding, or in any way obstructing access to such a facility; and "imped[ing] the passage of any person entering" therein.

In its Ruling on the Motion for Preliminary Injunction entered September 21, 1989, the district court raised *sua sponte* the issue of subject matter jurisdiction, but concluded after examining the Complaint that federal jurisdiction was properly invoked, as follows:

> Plaintiff claims that defendants have operated a RICO "enterprise," Operation Rescue, through a pattern of racketeering activity, including violations of the Hobbs Act, 18 U.S.C. § 1951. The "pattern of racketeering" alleged is the plan**[99]**ning and carrying out of trespassory entries and occupations of the Center for the purpose of intimidating the Center, its patients and employees. The gravamen of plaintiff's complaint is that defendants seek by these occupations to extort from the Center its right and ability to conduct its activities and to extort from the Town its ability to protect the rights of the Center, its patients, and the Town's citizens. Plaintiff claims injury in the form of overtime expenses, injury to an employee, and

> interference with ability to provide police, fire an other emergency services to its citizens.

726 F.Supp. at 376.

The district court proceeded to consider the availability of injunctive relief under the various asserted claims. It declined to grant an injunction based upon the RICO claim, ruling that 18 U.S.C. §1964(c) (1988) does not authorize the remedy of injunction for a private party, *id.* at 376-78, but concluded that an injunction could properly issue under the pendent state common-law claim of public nuisance, *id.* at 380-82. The court accordingly issued a preliminary injunction barring the following parties from entering or remaining upon the property or offices of the Center, or blocking, obstructing, or otherwise impeding access thereto:

> defendants Operation Rescue, John Kladde, John Charles Grant, Jean Pollock, Catherine A. Jersey, Lillian A. Loughlin, William Calvin, William P. Cotter, and Hjalmar Syversen, and ... their officers, agents, servants, employees and attorneys, and ... those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Id. at 384.

This appeal followed.

Discussion

A. Principles of Subject Matter Jurisdiction.

The action was brought pursuant to the statute granting federal question jurisdiction, 28 U.S.C. § 1331 (1988).

Defendants-appellants contend that the Town has failed properly to invoke that jurisdiction because it has not presented even minimally plausible claims (1) that "racketeering activity" within the meaning of 18 U.S.C. § 1962(c) (1988), in the form of predicate acts of extortion indictable under 18 U.S.C. § 1951 (1988), has occurred; or (2) that the Town has been "injured in [its] business or property" within the meaning of 18 U.S.C. § 1964(c) (1988). For the reasons that follow, we agree that there is no subject matter jurisdiction over this action.

The question of subject matter jurisdiction must be confronted at the threshold of the case. As the Supreme Court stated in *Bender v. Williamsport Area School, Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501:

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See *e.g., Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-180 [2 L.Ed. 60] (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332, 97 S.Ct. 1211, 1215, 51 L.Ed. 2d 376 (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440,

56 S.Ct. 829, 831-32, 80 L.Ed. 1263 (1936) (footnotes omitted).

Consideration of the issue of jurisdiction is not equivalent, however, to an evaluation of the merits of a party's federal claim. Accordingly, a case that cannot survive a **[100]** motion to dismiss for failure to state a claim upon which relief can be granted, *see* Fed.R.Civ.P. 12(b)(6), may nonetheless properly be in federal court. The Court addressed this distinction in *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951), as follows:

> As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.... If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, "* * * if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716

In this vein, the Court has fashioned the following test for determining whether federal question jurisdiction exists:

> [I]t is not necessary to decide whether appellees' alleged cause of action ... is in fact a cause of action "on which [appellees] could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 [66 S.Ct. 773, 776, 90 L.Ed. 939] (1946). Instead, the test is whether "'the cause of action alleged is *so patently without merit* as to justify ... the court's dismissal for want of jurisdiction.'" *Hagans v.*

> *Lavine*, 415 U.S. 528, 542-43 [94 S.Ct. 1372, 1382, 39 L.Ed. 2d 577] (1974), quoting *Bell v. Hood, supra*, [327 U.S.] at 683 [66 S.Ct. at 776]. (Emphasis added). See also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 [94 S.Ct. 772, 776, 39 L.Ed.2d 73] (1974) (test is whether right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy").

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 70-71, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978); *see also State of N.Y. Dist. Attorney Investigators v. Richards*, 711 F.2d 8, 10 (2d Cir. 1983); *Giulini v. Blessing*, 654 F.2d 189, 192 (2d Cir. 1981) ("For jurisdictional purposes the test is whether the complaint on its face, without resort to extraneous matter, is so plainly insubstantial as to be devoid of any merits and thus not presenting any issue worthy of adjudication."); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 n.3 (2d Cir. 1977).

Against this background, we turn to the question whether the Town's RICO claim satisfied this minimal, yet unyielding, jurisdictional standard.

B. The Town's RICO claim.

"To state a claim for damages under RICO a plaintiff has two pleading burdens." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984). First, the plaintiff must assert that the defendant has violated 18 U.S.C. § 1962 (1988), the substantive RICO statute. Specifically, it must be alleged:

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of

> "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate of foreign commerce. 18 U.S.C. § 1962(a)-(c) (1976).

Moss, 719 F.2d at 17. The plaintiff's second "pleading burden" is to allege that he was "'injured in his business or property *by reason of* a violation of section 1962.'" *Id.* (quoting 18 U.S.C. §1964(c)).

The Town claims that the "racketeering activity" which occurred in this case consisted of acts of extortion violative of the Hobbs Act, 18 U.S.C. § 1951 (1988). Section 1951 states in pertinent part that:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by* robbery or *extortion* or attempts or conspires so to do, or commits or threatens physical violence to **[101]** any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> * * * * * *
>
> (2) the term "extortion" means *the obtaining of property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Emphasis added.

The primary theory of the Town's RICO claim, as expressed in its complaint, is that defendants undertook activities designed to "extort" from the Town (1) a softened response to future protest activities, and (2) the reduction or abandonment of charges against those arrested in connection with the protests that occurred on April 1 and June 17, 1989. As a somewhat subordinate theme, however, the complaint also claims that the defendants extorted the Center by impeding its performance of abortions, and that this extortion is somehow actionable by the Town.

The Town's response to the district court's RICO Case Order summarized these contentions as follows:

> Operation Rescue, as well as the other named defendants acting in conjunction with others, have repeatedly extorted or attempted to extort from providers of abortion services a closure of their facilities. In addition, the defendants have attempted to extort, on repeated occasions, softened police response to their criminal actions in furtherance of their goal of closing abortion facilities.

The district court made a similar assessment:

> The gravamen of plaintiff's complaint is that defendants seek by these occupations to extort from the Center its right and ability to conduct its activities and to extort from the Town its ability to protect the rights of the Center, its patients, and the Town's citizens.

726 F.Supp. at 376.

Both in its brief on appeal and at oral argument of the appeal, the Town emphasized the contention that defendants' goal was extortion of the Center, rather than the Town. In

either event, the Town claims that defendants' alleged extortion is actionable by the Town. We accordingly consider both contentions in turn.

1. *Direct Extortion of the Town*

As earlier stated, "extortion," as defined in 18 U.S.C. § 1951(b) (1988), "means the obtaining of property from another" by wrongful means. It is not surprising that, on appeal, the Town has backed away from the primary theory of its complaint, that defendants sought by their activities a "softened response" to the protests. It is obvious that the realization of this goal would not constitute an "obtaining" of the Town's "property" within any coherent meaning of those terms.

The definition of "property" under the Hobbs Act is admittedly expansive. The Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed.2d 252 (1960). Further, "property" under the Act "includes, in a broad sense, any valuable right considered as a source or element of wealth," including "a right to solicit business." *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.2d 530 (1970); *see also Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), ("Rights involving the conduct of business are property rights."), *cert. denied*, -- U.S. --, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

The Act's requirement that property be "obtain[ed]" is given a similarly broad construction. There is no requirement that the perpetrator of an extortion receive the benefit of his act. *See, e.g., United States*[102] *v. Clemente*, 640 F.2d 1069, 1079-80 (2d Cir.) ("[W]hether a Hobbs Act defendant personally

receives any benefit from his alleged extortion is largely irrelevant for the purpose of determining guilt under that Act."), *cert. denied*, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981).

Nonetheless, however broadly the statute is read, the term "property" cannot plausibly be construed to encompass altered official conduct. The contention is so blatantly implausible that its rejection requires no aid from the rule of lenity, which is clearly pertinent to the construction of this criminal statute. *See Hughey v. United States*, ___ U.S. ___, 110 S.Ct. 1979, 1985, 109 L.Ed.2d 408 (1990); *Crandon v. United States*, ___ U.S. ___, 110 S.Ct. 997, 1001-02, 108 L.Ed.2d 132 (1990); *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971).

We note that both the Town's complaint, *see id.* ¶ 83, and the district court opinion, *see* 726 F.Supp. at 376, mention that the Town incurred overtime police expense as a result of defendants' activities. In our view, this does not provide a colorable basis to claim a Hobbs Act violation. Virtually, any conduct that elicits a governmental response will require activity by one or more salaried government employees. It is simply not tenable to translate the activation of such a response into a Hobbs Act obtention of "property," and it is not surprising that the Town has not pressed such a theory in this litigation.

We note further that it would be difficult to construe the defendant's activities as described in the complaint, consisting of resistance to police efforts to clear protesters from the Center and assertedly false accusations of police brutality in doing so, as the "wrongful use of actual or threatened force, violence or fear" within the meaning of section 1951(b). We also note the first amendment implications of any ruling that, for example, the publication of a paid advertisement alleging police brutality (*see*

complaint ¶ 80) violates a federal statute which defines a felony punishable by twenty years imprisonment and a fine of $10,000.

2. *Extortion of the Center Actionable by the Town.*

This theory is equally untenable. Assuming *arguendo* that interference with the Center's operations constituted extortion of the Center, the role of the Town was, through its police agencies, to terminate the interference and the resulting extortion of the Center. The Town apparently is attempting to contend that (1) by endeavoring to impede or delay the Town's efforts to terminate defendants' extortion of the Center, (2) defendants "used" the Town to extort the Center, thereby (3) extorting the Town. *See, e.g.*, the Town's brief on appeal at 23 ("defendants . . . seek to take a benefit away from [the Center], to use the Town . . . in the process, and to turn the entire affair to their advantage"). So bizarre a construction of the Hobbs Act affronts common sense, much less the rule of lenity.

The district court made clear that, despite the grant of the Center's motion to intervene subsequent to the hearing on the Town's motion for a preliminary injunction, "[p]reliminary relief is here considered only as a question of entitlement of [the Town]." 726 F.Supp. at 373 n.1. The Town, nonetheless, in its brief and argument on appeal, stresses defendants' alleged extortion of the Center.

We addressed a similar contention in *State of N.Y. by Abrams v. Seneci*, 817 F.2d 1015 (2d Cir. 1987), also a civil RICO case, where we said:

> A state that sues as *parens patriae* must seek to redress an injury to an interest that is separate from the interests of particular individuals. The state cannot merely litigate as a volunteer the personal claims of its

> competent citizens. Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests. Thus, the state as *parens patriae* lacks standing to prosecute such a suit.

Id. at 1017 (citations omitted).

So here, whatever RICO claim the Center may have against these defendants, there **[103]** is no plausible basis for its assertion by the Town.

3. Injury to Business or Property.

The Town's inability to assert any plausible Hobbs Act violations against it results in a failure to establish "racketeering activity" within the meaning of 18 U.S.C. § 1962(c) (1988). 18 U.S.C. § 1964(c) (1988) poses still another obstacle to the Town's RICO claim, for it provides a civil remedy only to "[a]ny person injured in his business or property by reason of a violation of section 1962."

Both RICO and the Clayton Act, 15 U.S.C. § 15 *et seq.* (1988), "aim to compensate the same type of injury; each requires that a plaintiff show injury 'in his business or property by reason of' a violation." *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151, 107 S.Ct. 2759, 2764, 97 L.Ed.2d 121 (1987) (quoting § 1964(c)). Furthermore, "[t]he close similarity of the two provisions is no accident. The 'clearest current' in the legislative history of RICO 'is the reliance on the Clayton Act model.'" *Malley-Duff*, 483 U.S. at 151, 107 S.Ct. at 2764 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489, 105 S.Ct. 3275, 3281, 87 L.Ed.2d 346 (1985)). In light of this history, cases interpreting the meaning

of "business or property" in the Clayton Act context have applicability in the RICO area, as well.

In *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), the State of Hawaii claimed damages for an injury to its general economy allegedly attributable to an antitrust violation. The Supreme Court rejected the state's claim, stating:

> Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises. When the State seeks damages for injuries to its commercial interests, it may sue under § 4 [of the Clayton Act, codified at 15 U.S.C. § 15 (1988)]. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act.
>
> Support for this reading of § 4 is found in the legislative history of 15 U.S.C. § 15a, which is the only provision authorizing recovery in damages by the United States, and which limits that recovery to damages to 'business or property.' The legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy *or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services.*

405 U.S. at 264-65, 92 S.Ct. at 892 (emphasis added, footnote and citations omitted). The Court subsequently explained that "[t]he phrase 'commercial interests' was used [in *Hawaii*] as a generic reference to the interests of the State of Hawaii as a party to a commercial transaction." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341-42, 99 S.Ct. 2326, 2332, 60 L.Ed.2d 931 (1979).

The Town contends that the present action is consistent with *Hawaii*, stating:

> The Town has already suffered reduced ability to respond to police and fire emergencies on two separate occasions. The Town has already twice suffered from having its contracted emergency paramedic services impaired. The Town has already suffered from being forced to have its police officers work in an unnecessarily impaired level of alertness; resulting in injury to at least one police officer. Further, if nothing else, the Town has already suffered from overtime wage expenses, which it otherwise would not have incurred. Those expenses totalled over $42,000. These are not the type of "damages for injury to [the Town's] general economy" for which the Court has prohibited recovery under the Clayton Act, let alone RICO. See *Standard Oil Co.*, 405 U.S. at 264 [92 S.Ct. at 892]. These damages are quantifiable, tangible and, in at least two respects, contractual. The damages already suffered by the Town, and threatened for the future as a direct result of the defendants' conduct are entirely proprietary in nature. They are, in effect, **[104]** damages to its *business* rather than damages to its more amorphous government interests or powers.[2]

Brief on appeal at 14-15 (citations to appendix and footnote omitted).

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[2] We note that the Town's complaint, para. 83, alleges that defendants' activities "have caused injury to the *governmental* functions and propery of the plaintiff . . ." (emphasis added), and goes on to specify essentially the same injuries that the Town portrays in its brief on appeal as "damages to its *business* rather than damages to its more amorphous governmental interests or powers."

We are unpersuaded. *Hawaii* refers not only to injuries to a governmental entity's "general economy," 405 U.S. at 264, 92 S.Ct. at 892, but also to its "ability to carry out its functions," *id.* at 265, 92 S.Ct. at 892, as falling outside the concept of statutory injury to its "business or property." The subsequent gloss in *Reiter v. Sonotone*, 442 U.S. at 341-42, 99 S.Ct. at 2332, allowing a governmental entity to recover for such injury only when it functions "as a party to a commercial transaction," makes the point even clearer. Injuries of the sort asserted by the Town do not fall within the ambit of section 1964(c).

We need not rule, however, that the Town's view of section 1964(c) is so implausible that, standing alone, it would warrant dismissal of the Town's RICO claim for failure of subject matter jurisdiction. Suffice it to say that the section 1964(c) problem heightens the already severe inadequacies of that claim which result from the Town's meritless invocations of the Hobbs Act.

We reiterate, finally, our recent admonition that "the purpose of civil RICO liability does not extend to deterring any illegal act . . . for which there are state and common law remedies." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990). We have stated "our own views that the RICO provisions cast too wide a net with respect to the civil actions that may be brought." *Beauford v. Helmsley*, 865 F.2d 1386, 1393 (2d Cir.) (in banc), *cert. denied*, __ U.S. ___, 110 S.Ct. 539, 107 L.Ed.2d 537 (1989); *cf. United States v. Biaggi*, 909 F.2d 662, 686 (2d Cir. 1990) (in criminal context, "RICO was not enacted as an automatic sentence enhancement device"). We have also made clear that we will, of course, enforce the statute as written by Congress. *See Beauford*, 865 F.2d at 1386. That does not imply, however, any disposition on the part of this court to countenance fanciful invocations of the draconian RICO weapon in civil litigation. "'Just as "[w]e are not at liberty to

seek ingenious analytical instruments" to avoid giving a congressional enactment the broad scope its language and origins may require, *United States v. Price*, 383 U.S. [787], at 801 [86 S.Ct. 1152 at 1160, 16 L.Ed.2d 267], so too are we not at liberty to recast the statute to expand its application beyond the limited reach Congress gave it.'" *Ngiraingas v. Sanchez*, __ U.S. ___, 110 S.Ct. 1737, 1743, 109 L.Ed.2d 163 (1990) (quoting *District of Columbia v. Carter*, 409 U.S. 418, 432, 93 S.Ct. 602, 610, 34 L.Ed.2d 613 (1973)).

C. Pendent Jurisdiction

In light of our determination that the Town's RICO claim must be dismissed for lack of subject matter jurisdiction, we must consider the question whether the pendent state law claims should also be dismissed. We conclude that dismissal is appropriate.

While "[t]he exercise of pendent jurisdiction is a matter committed to the sound discretion of the district court," *Perez v. Ortiz*, 849 F.2d 793, 798 (2d Cir. 1988), it is well settled that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *see also Powell v. Gardner*, 891 F.2d 1039, 1046-47 (2d Cir. 1989). Here, since the federal claims are, in fact, "insubstantial in a jurisdictional sense," and the case is only in a preliminary stage, there is no basis for the exercise of pendent jurisdiction over the Town's state law claims against defendants. Accordingly, the complaint should be dismissed in its entirety.

[105] *Conclusion*

The preliminary injunction is vacated, and the case is remanded to the district court with instructions to dismiss all

claims asserted by the Town for lack of subject matter jurisdiction. As we previously noted, the Center, after its motion to intervene was granted, joined with the Town in an amended complaint and thereby asserted its own RICO claims. We have not considered the sufficiency of the Center's claims, and the district court may in its discretion do so, consistent with this opinion, on remand. *See Pressroom*, 700 F.2d at 893 n.9; *Hackner v. Guaranty Trust Co.*, 117 F.2d 95, 98-99 (2d Cir.), *cert. denied*, 313 U.S. 559, 61 S.Ct. 835, 85 L.Ed. 1520 (1941), 317 U.S. 691, 63 S.Ct. 266, 87 L.Ed. 553 (1942); 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1917, at 458-59 ("if there is an independent basis for jurisdiction with regard to the intervenor[,] the court has discretion to treat his pleading as a separate action in order to adjudicate the claims raised by him.").

Costs to appellants on the main appeal, other than appellants Randall A. Terry, Project Life, Inc., Eileen M. Haggerty, Spear Printing Company, and John M. Spear. *See supra* note 1. The parties shall bear their own costs on rehearing.

KEARSE, Circuit Judge, dissenting:

Though I might agree on other grounds that the preliminary injunction should be vacated, I must respectfully dissent from the majority's ruling that the complaint of plaintiff Town of West Hartford ("Town") should be dismissed for lack of federal subject matter jurisdiction.

The Town has sought to set forth civil RICO claim, *see* 18 U.S.C. § 1964 (1988), on the premise that defendants engaged in extortion against the Town in violation of the Hobbs Act, 18 U.S.C. § 1951 (1988). The Hobbs Act defines "extortion" as "the obtaining of property from another" by wrongful means. *Id.* § 1951(b)(2). As the majority notes, a

person may be guilty of extortion under this section even though he personally has not received any benefit from the extortion. *See, e.g., United States v. Clemente*, 640 F.2d 1069, 1079-80 (2d Cir.), *cert. denied*, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981).

The majority finds that there is no subject matter jurisdiction because it concludes that the Town has not contended that it was deprived of property; the majority states that the mere "elicit[ation of] a governmental response [that] will require activity by one or more salaried government employees" is not the obtaining of "'property.'" (Majority opinion, *ante* at 103.) Though I might agree with this statement in the abstract, it is inapposite to the present case. The Town has alleged that "defendants . . . engaged in a pattern of extortionate acts, as defined under the Hobbs Act, . . . and those acts have caused injury to . . . property of the plaintiff, including . . . extraordinary overtime costs." (Complaint ¶ 83.) I think the assertion that the Town has been forced to expend certain identifiable *extra* sums of money must be accepted as an allegation that it has been deprived pro tanto of "property" within the meaning of the Hobbs Act. The allegation that the Town was required to pay extra moneys to its employees is no less an assertion that it has been deprived of "property" than would be an allegation, for example, that it had been forced against its will to hire an extra employee, or had incurred extra expenses in constructing or operating a municipal building as a result of bid-rigging by suppliers.

Little is needed for a plaintiff to assert a claim sufficient to give the federal court jurisdiction. Where the complaint "is so drawn as to seek recovery directly under the Constitution or laws of the United States," *Bell v. Hood*, 327 U.S. 678, 681, 66 S.Ct. 773, 775, 90 L.Ed. 939 (1946), the district court must entertain the suit unless the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining

jurisdiction or where such a claim is wholly insubstantial and frivolous." *id.* at 682-83, 66 S.Ct. at 776.

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for judgment on the merits and not for a dismissal for want of jurisdiction.

Id. at 682, 66 S.Ct. at 776. A dismissal because of the inapplicability of a federal statute to the facts alleged is more aptly termed one for failure to state a claim than one for lack of jurisdiction, so long as the question presented is nonfrivolous. *See, e.g., Schwartz v. Gordon*, 761 F.2d 864, 867 n.4 (2d Cir. 1985); *Spencer v. Casavilla*, 903 F.2d 171, 173 (2d Cir. 1990). I cannot agree that the Town's claim of property loss is so insubstantial as to fail to invoke subject matter jurisdiction.

[106] The greater weakness in the Town's case, in my view, assuming the Town's extra expenditures as a result of the defendants' actions, is whether the actions themselves may properly be viewed as extortionate. To establish a Hobbs Act extortion claim, there must be proof that the property was obtained "by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). I have serious doubts as to whether the allegedly extortionate actions attributed to defendants by the Town, *i.e.*, principally their resisting arrest, refusing to identify themselves at arraignment, falsely claiming the use of excessive force during arrest, and threatening to renew their demonstrations, are within the scope of this provision. Given this weakness in the Town's case, the preliminary injunction against defendants' demonstrations may well have been an abuse of discretion, and summary judgment against the Town might well be appropriate.

But I do not think the case was dismissable for lack of jurisdiction.

APPENDIX D

TOWN OF WEST HARTFORD,
a municipal corporation located in Hartford County, State of Connecticut

v.

OPERATION RESCUE; Joseph M. Scheidler; Randall A. Terry; Project Life, Inc.; Connecticut Pro-Life Action Network; John Kladde; John Charles Grant; Eileen M. Haggerty; Jean Pollock; Spear Printing Company, Inc.; John M. Spear; Catherine A. Jersey; Maria D. Garvey; Lillian A. Loughlin; William Calvin; William P. Cotter; Hjalmar Syversen; Faithful and True Roman Catholics; John Doe(s); and Jane Doe(s).

Civ. No. H-89-400 (PCD).
United States District Court,
D. Connecticut.
Sept. 21, 1989.

[373]* Marjorie S. Wilder, Patrick G. Alair, Asst. Corp. Counsel, Town of West Hartford, West Hartford, Conn., for plaintiff.

George J. Mercer, Groton, Conn., Anthony Slez, Jr., Westport, Conn., pro hac vice for Operation Rescue, Randall Terry and Project Life, Inc.

Pamela Hershinson, Jon L. Schoenhorn, Hartford, Conn., for intervening plaintiff.

Amy J. Greenberg, Bridgeport, Conn., for Summit Women's Center, Inc.

Desiree M. Jones, Bodell & Gross, Madison, Conn., for Randall Terry.

James Altham, Hamden, Conn., for Eileen M. Haggerty, Jean Pollock, Spear Printing Co., Inc., and John M. Spear.

Vincent P. McCarthy, New Milford, Conn., for Jean Pollock, Spear Printing Co., Inc., John M. Spear, Catherine A. Jersey, Lillian A. Loughlin, and William Calvin.

Joseph P. Secola, Milford, Conn., for Operation Rescue, Joseph M. Scheidler, Randall A. Terry, and non-party Anthony J. Nania.

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* Bracketed numbers indicate page numbers from decision reported at 726 F.Supp. 371 (D. Conn. 1989).

RULING ON MOTION FOR PRELIMINARY INJUNCTION

DORSEY, District Judge.

This action relates to anti-abortion protests on April 1 and June 17, 1989 at the Summit Women's Center ("Center") in West Hartford, Connecticut. The Center is a Connecticut corporation which provides gynecological care, abortion procedures, and other medical services in West Hartford.[1] Defendants are alleged to be anti-abortion activists who have participated in those protests. Plaintiff, Town of West Hartford (the "Town"), alleges that defendants sought by unlawful means to preclude the Center from performing abortions and to prevent the Town from diligently and effectively rendering municipal services, including the enforcement of the law, particularly at the lowest possible cost. The Town seeks damages, declaratory and injunctive relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*; 42 U.S.C. § 1985; Conn. Gen. Stat. § 46a-58(a); and the common law of conspiracy, negligence and public nuisance.

This memorandum shall serve as the court's findings of fact and conclusions of law under Fed.R.Civ.P. 52(a).

I. Findings of Fact

1. The Center is a women's health care facility located on the third floor of an office building within a shopping

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[1] The Center's motion to intervene was granted August 28, 1989, after the preliminary injunction hearing. Preliminary relief is here considered only as a question of entitlement of the original plaintiff, the Town of West Hartford.

center at 345 North Main Street, West Hartford. The Center provides medical services, including abortions, to women.

2. On April 1 and June 17, 1989, the Center was the scene of large-scale anti-abortion demonstrations. Large numbers of protesters picketed and distributed leaflets outside the building, but moved to public property when requested. They approached women headed for the Center seeking to dissuade them from the Center and particularly from undertaking abortions. The approaches were forceful and persistent.

3. On each date, a large number of persons, including some defendants, entered and/or blocked the offices of the Center without permission, for the purpose of closing down the Center and preventing and discouraging abortions.[2]

4. Entry to the Center was gained by rescuers posing as patients who opened the doors for the entire group of rescuers. On June 17, rescuers simply pushed past a **[374]** Center employee who tried to prevent their entry.

5. On April 1, seventy-five to eighty rescuers arrived at about 7:45 a.m. and entered the Center shortly afterward. The last rescuer was not removed from the Center office until about 6:00 p.m. In June, over two hundred rescuers arrived at the Center about 7:30 a.m. and were not removed until 7:00 p.m. None of the rescuers had any lawful purpose, permission, nor reason for being in the Center offices.

6. On each occasion the rescuers were ordered to leave the premises by employees of the Center, an employee of the owner of the building, and the West Hartford police. The orders were ignored. Rescuers ensconced themselves throughout

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[2] The term "rescuers" distinguishes these persons from demonstrators who neither entered nor blocked the offices of the Center.

and outside the Center offices, obstructing access to treatment and recovery rooms and to the Center itself. Some door locks were forced, including some by police and firemen, and equipment was damaged. Elevators in the building were disabled and fire exists blocked.

7. On April 1, patients with appointments at the Center had to "run a gauntlet" of rescuers to enter the clinic and treatment rooms. They were entreated to "repent" and to save their souls by declining an abortion. Some patients were delayed by the obstructions. In June, the rescuers on the premises were so numerous and obstructive that the Center was unable to treat any patients. Twenty-five to thirty-five patients did not show for appointments, many explicitly because of the protest. Patients who did appear were late. Scheduled but uncompleted procedures included gynecological exams, dispensing of medications, and abortions.

8. Offices of others in the building, including medical and dental practitioners, during both the April and June incidents, were obstructed and patients unrelated to the Center were unable to enter to obtain necessary treatment.

9. Some of the Center's employees were intimidated by the invasions. On June 17, a receptionist suffered from an anxiety attack. Four employees quit, gibing fear of the protests as a reason.

10. Approximately forty West Hartford police officers responded to the scene on both dates. The department's total strength is about one hundred twenty-five. An ambulance and paramedics under contract to the Town were stationed at the Center during the protests and at the court where the arrestees were processed. In addition, the fire department was called to free five rescuers who had locked themselves together inside the Center.

11. On April 1, sixty-one persons were arrested on charges of criminal trespass, interfering with a police officer, and refusal to be processed. The latter charges arose from the arrestees' "passive resistance"--a refusal to walk after their arrest and to provide identification. The arrestees carried no identification. Defendants John Charles Grant, Catherine A. Jersey, and Hjalmar Syversen were arrested on April 1 for trespassing on the Center's property. On June 17, two hundred sixty-one persons were arrested on similar charges, including defendants William P. Cotter, John Charles Grant, Catherine Jersey, and Hjalmar Syversen. The procedure used by the police to identify these defendants was accurate. The defendants who were arrested for trespassing were, apparently, participating in an organized, intentional and criminal trespass on the property of the Center.

12. The demonstration and rescue was organized, prepared, and orchestrated. The rescuers arrived together and carried no identification. Upon arrest, they adopted a uniform posture, going limp, refusing to walk or cooperate with the arresting officers. On April 1, five rescuers locked themselves together with locks. Some of those detained appear to have exchanged clothes to hamper identification.

13. On each day, from among the demonstrators, one or more persons presented themselves to officials as "negotiators" authorized to speak for the arrestees. The arrestees responded to instructions from negotiators. On April 1, a person identified only as "Bill" acted in this capacity. At arraignment, "Bill" told the arrestees that they could provide identification and **[375]** be released if they wished, but reminded them of their commitment to refuse identification and remain in custody and requested they do so. He obtained the identification documents of those who wished to be released and supplied a single address and telephone number for all the arrestees.

14. "Bill" was requested to obtain keys to free the rescuers who had locked themselves together. "Bill" offered to speak to the "leaders." After appearing to have done so, he offered the keys if the charges against all arrestees were reduced to misdemeanors. When a meeting with the protest leaders was requested, "Bill" returned with defendant Kladde, who also offered the keys if the charges were reduced and stretchers were used to remove the arrestees. Kladde also offered a nurse to monitor the rescuers.

15. William Calvin functioned as the negotiator on June 17. William Cotter was observed in Quincy, Massachusetts, organizing and directing persons into cars to attend a protest. The convoy of cars were followed to Auburn, Massachusetts. Later that day, Cotter was arrested for trespassing at the Center.

16. There appears to be a substantial association of people who are committed to eliminating the availability of abortions. The association appears to be loose and not formed. Thus, groups have associated under the names "Operation Rescue," "Connecticut Pro-Life Action Network," and "Faithful and True Roman Catholics." Except for Pro-Life, Inc., none is shown to have a legal status. While Randall Terry has written the "bible" for rescuers and proclaims a role in "Operation Rescue," a banner which was shown to have been used by rescuers in the West Hartford incidents did not reveal him to have had a personal role in either incident. Neither has any other association been shown to have had a direct or immediate role in either incident. A number of the rescuers, including arrestees, by wearing the name and/or emblem "Operation Rescue" have adopted that name for their conduct and activity on April 1 and June 17.

17. Defendants Kladde, Grant, Jersey, Calvin, Cotter, Syversen, Loughlin and Pollock were all shown to have

been personally involved as rescuers. Defendant Loughlin was arrested for her activity. She testified that she came merely to picket and not to be arrested. In support of her limited role, she claimed to have had ample identification in a bag she was carrying; yet she did not claim to have given her name and the photographs of her arrest show no such bag. She is not credited on this regard. Defendant Pollock was not shown to have been arrested, but was shown to have exercised a leadership and organizational role in each demonstration. She did not testify in opposition. An individual named Haggerty was involved, but not clearly identified as Eileen Haggerty, the named defendant.

18. Rescues are indicated to be an ongoing activity. The Center has been shown to be a likely target for repetition of the demonstrations and rescues of April 1 and June 17.

II. Jurisdiction and Standing

Defendants have raised the threshold issues of personal jurisdiction and plaintiff's standing to bring this action. The issue of subject-matter jurisdiction is raised by the court sua sponte.

A. Personal Jurisdiction

Returns of service and/or acknowledgment of service by mail have been filed showing service on the following defendants:

Spear Printing Co. and John Spear on	July 20, 1989
Randall A. Terry and Operation Rescue on	July 25, 1989
William Calvin on	August 4, 1989
William Cotter on	August 10, 1989
John Kladde on	August 10, 1989

Catherine A. Jersey on . . . . . July 3, 1989
Joseph M. Scheidler on . . . . . July 18, 1989

For purpose of the motion for preliminary injunction, the court may exercise personal jurisdiction only over those defendants upon whom service has been made. *See also* Fed.R.Civ.P. 65(a)(1) (injunction may not issue without notice); *SEC v. Capital Growth Corp.*, 391 F.Supp. 593, 600 (S.D.N.Y. 1974).

[376]*B. Subject-Matter Jurisdiction*

Plaintiff's announced intention to withdraw its § 1985 claim, *see* Plaintiff's Post-Hearing memorandum at 50, leaves the RICO claim as sole basis for federal jurisdiction over this action.[3] Defendants have challenged the applicability of civil RICO to the conduct alleged. Because of plaintiff's reliance on RICO, the issue of subject-matter jurisdiction will be discussed first. *See* Fed.R.Civ.P. 12(h)(3). Defendants have not moved to dismiss the RICO claim and, at this preliminary stage, the legal sufficiency of plaintiff's pleadings are not specifically at issue. To support federal jurisdiction, the complaint need only be "'drawn so as to claim a right to recover under the Constitution and laws of the United States,'" which claim is not "'wholly insubstantial and frivolous.'" *Jackson Transit Auth. v. Transit Union,* 457 U.S. 15, 21 n. 6, 102 S.Ct. 2202, 2206 n. 6, 72 L.Ed.2d 639 (1982), quoting *Bell v. Hood*, 327 U.S. 678, 681-83, 66 S.Ct. 773, 775-76, 90 L.Ed. 939 (1946).

Plaintiff claims that defendants have operated a RICO "enterprise," Operation Rescue, through a pattern of racketeering

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[3] Although diversity jurisdiction has been alleged, the complaint on its face shows that complete diversity between the parties is lacking. *See* Complaint, ¶ 1 (plaintiff is a municipal corporation located in Connecticut); ¶¶ 7, 8, 9 (alleging Connecticut residence of defendants Kladde, Grant and Haggerty).

activity, including violations of the Hobbs Act, 18 U.S.C. § 1951. The "pattern of racketeering" alleged is the planning and carrying out of trespassory entries and occupations of the Center for the purpose of intimidating the Center, its patients and employees. The gravamen of plaintiff's complaint is that defendants seek by these occupations to extort from the Center its right and ability to conduct its activities and to extort from the Town its ability to protect the rights of the Center, its patients, and the Town's citizens. Plaintiff claims injury in the form of overtime expenses, injury to an employee, and interference with ability to provide police, fire and other emergency services to its citizens.

There is a basis for pendent jurisdiction. The federal and state claims derive from a "common nucleus of operative fact," the circumstances of the events at the Center on April 1 and June 17. *See United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 11, 16 L.Ed.2d 218 (1966). They are sufficiently interrelated that plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Id.* The exercise of pendent jurisdiction is discretionary, but a presumption favors exercising jurisdiction where its exists. *Miller v. Lovett,* 879 F.2d 1066, 1071-72 (2d Cir. 1989). Although the court must exercise discretion as to pendent jurisdiction at every stage of the proceedings, *see Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 618, 98 L.Ed. 2d 720 (1988), on the present record pendent jurisdiction exists and will be exercised over the state law claims. *Cf. State of New York v. Shore Realty Corp.,* 759 F.2d 1032, 1050 (2d Cir. 1985) (existence of colorable federal claim authorizes federal court to hear state claims and grant injunction), *but see Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139 (where federal claims dismissed before trial, pendent claims ordinarily should be dismissed as well).

III. Availability of an Injunction Under RICO

Defendants argue that injunctive relief is not available under RICO's civil provision, 18 U.S.C. § 1964.[4] Whether civil RICO **[377]** provides injunctive relief to a private plaintiff has produced disagreement among courts which have addressed the question. *Religious Technology Center v. Wollersheim,* 796 F.2d 1076, 1081-88 (9th Cir. 1986), *cert. denied,* 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987) (no private injunctive relief); *Miller v. Affiliated Fin. Corp.,* 600 F.Supp. 987, 994 (N.D.Ill. 1984) (same); *Ashland Oil, Inc. v. Gleave,* 540 F.Supp. 81, 84-86 (W.D.N.Y. 1982); *see Sedima, S.P.R.L. v. Imrex Co.,* 741

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[4] Section 1964 states:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.
(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

F.2d 482, 489 n. 20 (2d Cir. 1984) (concluding, in extended dictum, that § 1964(c) was not intended to provide equitable relief), *rev'd on other grounds*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (implying, without deciding, that equitable relief unavailable to private plaintiff under RICO); *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28-29 (2d Cir. 1983) (same); *cf. In re Frederman Litigation*, 843 F.2d 821, 830 (5th Cir.), *reh'g denied*, 847 F.2d 840 (5th Cir. 1988) (RICO does not authorize injunction to restrain defendants' transfer of assets; suggesting approval of *Wollersheim); but see Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F.Supp. 908, 910-11 (E.D.N.Y. 1983) (Pratt, J.) (Congress did not intend civil RICO provisions to deprive district court of traditional equitable jurisdiction), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (suggesting injunctive relief available either under RICO or general equitable powers), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983).

In *Sedima*, the Second Circuit, after an extensive review of RICO's legislative history, observed that "[i]t thus seems altogether likely that § 1964(c) as it now stands was not intended to provide private parties injunctive relief." 741 F.2d at 489 n. 20. However, the precedential effect of this dictum, if dictum is accorded any precedential quality, is questioned by what *Wollersheim* referred to as "the Supreme Court's total rejection of the conclusions drawn by the Second Circuit from its historical analysis of the RICO statute. *See* [473 U.S. 479], 105 S.Ct. 3275." *Wollersheim*, 796 F.2d at 1081. Nevertheless, *Wollersheim* also concluded that civil RICO does not authorize injunctive relief to private parties.

Reduced to outline form, *Wollersheim* rationalized as follows:

1. Under ordinary rules of statutory construction, the express inclusion of an *injunctive* remedy to the United States in § 1964(b) and a *damage* remedy to private parties in § 1964(c) implies the exclusion of *private injunctive* remedy. *Wollersheim*, 796 F.2d at 1083. The Second Circuit accepted a variant of this argument in holding that the United States is not a "person" entitled to sue for damages under § 1964(c), in part because it was not expressly so authorized. *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 27 (2d Cir. 1989); *cf. Shore Realty Corp.*, 759 F.2d at 1049 (express grant of injunctive remedy to United States under environmental statute precludes implied grant of injunctive relief to states, citing RICO § 1964 as example).

2. The House of Representatives, when formulating RICO's private remedy provisions, rejected an express authorization of private injunctive relief, H.R. 19215, 91st Congress, 2d Sess. 116 Cong.Rec. 31,914 (1970), in favor of only an explicit private action for treble damages, H.R. 19586, 91st Cong. 2d Sess. 56 (1970). *Wollersheim*, 796 F.2d at 1084-85; *see also Sedima*, 741 **[378]** F.2d at 488 n. 18, 489 n. 20, and 473 U.S. at 487-88, 105 S.Ct. at 3280-81 (referring to same legislative history). During the House floor debate on RICO, an amendment providing for a private injunctive remedy was offered by Rep. Steiger, but withdrawn without a vote because the proposal for a "new remedy" had not been considered by the Judiciary Committee. *Wollersheim*, 796 F.2d at 1086, quoting 116 Cong.Rec. at 35,346 (1970) (remarks of Rep. Poff, RICO's House sponsor). *See also Sedima*, 741 F.2d at nn. 20, 22, and 473 U.S. at 487-88, 105 S.Ct. at 3280-81 (noting hostility to proposal for private injunctive remedy). In the next term of Congress, the same amendment as that offered by Rep. Steiger was proposed to amend RICO. S. 16, 92nd Cong., 1st Sess. (1971). The Bill passed the Senate, but not the House and never became law. *Wollersheim*, 796 F.2d at 1086. Thus, Congress,

presented with proposals expressly providing a private injunctive remedy in civil RICO, has consistently rejected such a provision.

3. Section 1964(c) is analogous to Section 4 of the Clayton Act, 15 U.S.C. § 15(a), which authorizes a private treble damage remedy in antitrust violations in substantially identical language. Section 4 of the Clayton Act has been held to preclude private injunctive relief. *Paine Lumber Co. v. Neal,* 244 U.S. 459, 471, 37 S.Ct. 718, 719, 61 L.Ed. 1256 (1917). Congress was aware of and, had it desired to do so, "could have completed the analogy between civil RICO and the antitrust laws by including in civil RICO a private equitable relief remedy like section sixteen of the Clayton Act [expressly authorizing private injunctive remedy]. That it did not do so ... strongly suggests that Congress did not intend to give private civil RICO plaintiffs access to equitable remedies." *Wollersheim,* 796 F.2d at 1087. *Compare United States v. Cooper Corp.,* 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1941) (United States not authorized to bring action for treble damages under Section 7 of Sherman Act), *and Bonanno Organized Crime Family,* 879 F.2d at 23-24 (relying on *Cooper* to reach similar conclusion under § 1964(c)).

The arguments marshaled in *Wollersheim* and the Second Circuit opinion in *Sedima* are convincing, indeed compelling. The private remedy provision of RICO, now § 1964(c), was a late addition to the statute as it progressed through Congress. The legislative history discusses the provision, to the extent it is discussed at all, as a private *damages* remedy. *See, e.g.,* 116 Cong.Reg. 35,295 (remarks of Rep. Poff); H.R. No. 91-1549, 91st Congress, 2d Sess. 35, *reprinted* 1970 U.S.Code Cong. & Ad. News 4007, 4010. There is nothing in the language or history of § 1964(c) to suggest that in enacting a private damage remedy Congress also authorized private injunctive relief. Accordingly, the court declines to issue an injunction based upon plaintiff's civil RICO claim.

IV. Pendent State Claims

A. Injunction Standard

To obtain an injunction plaintiff must demonstrate "not only that it is likely to suffer irreparable injury if relief is denied but also that there is either (1) a likelihood of success on the merits or (2) a sufficiently serious question going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the plaintiff's favor." *Proctor & Gamble Co. v. Chesebrough-Pond's, Inc.*, 747 F.2d 114, 118 (2d Cir. 1984); *Coca-Cola v. Tropicana Prod., Inc.*, 690 F.2d 312, 314-15 (2d Cir. 1982). The pendent claims allege conspiracy (Count II); violation of Conn.Gen.Stat. § 46a-58(a) (Count IV); negligence (Count VI); and public nuisance (Count VI).

(1) Irreparable Injury

Plaintiff claims that the occupations of the Center on April 1 and June 17, and the rescuers' conduct after arrest, interfered with its ability to provide police, fire and ambulance services to its citizens. It alleges that a renewed occupation would cause similar injuries for which there is no adequate remedy at law. It is found that the April and June occupations of the Center caused injury to the Town for which there is no adequate remedy at law and **[379]** which would represent irreparable injury to their likely recurrence.

1. Both the April 1 and June 17 occupations required the Town to transfer numerous on-duty police officers from other scheduled duties to the task of arresting and processing protesters. Approximately forty officers, about one-third of the department, were stationed at the Center on each date. Correspondingly, the police department was not able to maintain the level of police visibility, presence and protection

normally provided the Town. Had an emergency situation developed away from the Center, the department would not have been able to shift officers to that situation promptly. In addition, police officers were required to remain on duty for periods exceeding their normal duty shift. The extended working hours resulted, upon officers' resumption of normal duties, in fatigue, reduced alertness, and less effectiveness. Wholly apart from the overtime wage expense, these injuries present harm which cannot be quantified nor redressed by compensatory damages.

2. The April 1 protest required the Town to detail a fire department unit to free interlocked rescuers. That effort, the personnel and equipment committed, reduced the ability of the fire department to provide emergency services to others.

3. On both dates, an ambulance and attendants were required to stand by at the Center and later at the courthouse where arrestees were processed. This diversion increased the response time for emergency ambulance calls within the Town, at considerable risk to other citizens in need. By contract, the response time is required to be within five minutes for 80% of the calls. During the period June 17-19, while an ambulance and crew were detailed to the Center, response time exceeded five minutes in approximately 50% of the ambulance calls.

As to a recurrence of an occupation of the Center should an injunction not issue, the following is also found:

4. There was little or no warning of the April 1 and June 17 protests.

5. On June 17, defendant Calvin threatened additional, even larger protests in the future.

6. In the week before July 22, 1989, the Center received numerous telephone calls from persons, mainly men,

requesting directions to the Center and/or appointments for Saturday, July 22.

7. These calls formed a pattern similar to the pattern of calls which occurred prior to the June 17 occupation.

8. The TRO entered by this court was in effect from June 30 to July 10 and form July 13 to June 23.

9. No occupation of the Center occurred on July 22. However, a large-scale protest, at which persons were arrested for trespassing, did occur on that date at an abortion clinic in Brookline, Massachusetts, where no TRO was in effect.

The court concludes that there is a reasonable probability that but for the TRO a trespassory occupation of the Center would have occurred on July 22, and a protest will occur at the Center during the pendency of this action.

(2) Likelihood of Success on the Merits

(a) Conspiracy

The conspiracy count claims that defendants have engaged in unlawful activities "to obtain a power of coercion," Complaint, ¶ 89, and that plaintiff has sustained damages thereby. *Id.*, ¶ 90. Connecticut does not recognize an independent action for civil conspiracy. *See Acmat Corp. v. W.E. O'Neil Const. Co.*, 12 Conn.L.Trib. 18 (2 Conn.Sup.Rep. 121, Jan. 31, 1986). Liability must be based on "damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself." *Cole v. Associated Const. Co.*, 141 Conn. 49, 54, 103 A.2d 529 (1954) *Acmat Corp.*, 12 Conn.L.Trib. at 32 (liability also attaches where defendant aided and abetted tortious conduct). Plaintiff relies on the theory that defendants have intentionally interfered with the Town's financial

expectancies. Post-Hearing Memorandum at 47. However, the tort of interference with financial expectancies requires a showing "that, except for the tortious in**[380]**terference of the defendant, there was a reasonable probability that plaintiff would have entered into a contract or made a profit." *Goldman v. Feinberg*, 130 Conn. 671, 675, 37 A.2d 355 (1944). The Town makes no such claim in the complaint and has offered no evidence thereof. At most, defendants caused the Town to incur expenses in discharging its legal obligations. The Town is not a profit generating entity. Although the Town argues that it is a "business," it has not explained the nature of the business interest with which defendants interfered, nor specified any financial interest it would have obtained or enjoyed from a third party but for their conduct. Indeed, plaintiff has not shown that Connecticut law recognizes the operation of a municipal department, let alone a governmental function such as a police department, as a business for the purposes of this tort. Absent some evidence of plaintiff's financial expectancy, its probability of success on this claim is minimal.[5]

(b) Conn. Gen. Stat. § 46a-58(a)

Section 46a-58(a) provides:

> It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability.

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[5] Indeed, because plaintiff has not articulated the nature of its purported financial expectancy in either the complaint or its memoranda, this claim does not even supply a fair ground of litigation on the merits.

A person aggrieved by a discriminatory practice under this section may complain to the Connecticut Commission of Human Rights and Opportunities, which is empowered to determine damages and order injunctive relief. Conn.Gen.Stat. Annot. §§ 46a-82, 82(a)-(d) (West Supp. 1989); *see Sullivan v. Board of Police Comm'rs*, 196 Conn. 208, 216-17, 491 A.2d 1096 (1985). Enforcement or judicial review of such an order and temporary or permanent equitable relief may be had by appeal to the Superior Court. Conn.Gen.Stat. Annot. §§ 46a-94a, 95(a) (Supp. 1989). However, the statute does not provide a private right of action for violations of § 46a-58. *See Atkins v. Bridgeport Hydraulic Co.*, 5 Conn.App. 643, 647-48, 501 A.2d 1223 (1985) (no private right of action for violation of § 46a-60); *Osborn v. Rocklen Automotive Parts & Serv., Inc.*, 4 Conn. App. 423, 425, 494 A.2d 622 (1985); *compare* §§ 46a-98, 98a, 99 (creating private actions for other discriminatory conduct, but not for violations of § 46a-58). The administrative procedure, with appellate review, is the sole remedy for such a violation. It is not clear whether plaintiff, not the direct victim of the alleged violation, has standing to bring a complaint as a "person claiming to be aggrieved" under Conn.Gen.Stat. §46a-82. However, the Connecticut cases have held that failure to follow the administrative procedures deprives the courts of jurisdiction over a claim of violation of § 46a-60. *Sullivan*, 196 Conn. at 217-18, 491 A.2d 1096. That rule must also be applied to § 46a-58. Therefore, regardless of plaintiff's standing, its claim for injunctive relief under that provision cannot succeed as a matter of law. There is neither a likelihood of success nor fair ground for litigation on Count IV.

(c) Public Nuisance

Plaintiff alleges that defendants' activities constitute a public nuisance in that they are "designed to and do interfere with and endanger the public security, safety, and health and welfare of the Town of West Hartford and its citizens, especially

those women who seek abortions, family planning or medical services at West-Hartford facilities where abortions are performed." Verified Complaint, § 103.

"'Nuisance is a word often very loosely used; it has been not inaptly described as "a catchall of ill-defined rights." In its proper use, however, it involves as an essential element that it can be the natural tendency of the act or thing complained of **[381]** to create danger and inflict injury upon person or property.' *Hoffman v. City of Bristol*, 113 Conn. 386, 389, 155 A. 499 (1931)." *Conchar v. Kelson*, 114 Conn. 262, 271, 158 A. 545 (1932). "'Nuisances are public when they violate public rights, and produce a common injury; and where they constitute an obstruction to public rights, "that is, the rights enjoyed by citizens as part of the public." 39 Am. Jur. 286. "...[I]f the annoyance is one that is common to the public generally, then it is a public nuisance.... The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence.' *Nolan v. New Britain*, 69 Conn. 668, 678, 38 A. 703 (1897)." *Higgins v. Connecticut Light & Power*, 129 Conn. 606, 611, 30 A.2d 388 (1943). *See generally* Restatement (2d) Torts, § 821B (defining public nuisance as "an unreasonable interference with a right common to the general public"). As a government entity, a municipal corporation is entitled to bring an action to enjoin a public nuisance which threatens its citizens. *See, e.g., Planning & Zoning Comm'n of Middlefield v. Zemel Bros.*, 29 Conn. Supp. 45, 270 A.2d 562 (1970) (enjoining music festival in action by town authorities) Restatement (2d) Torts, § 821C(2)(b) (public official may bring suit on behalf of political subdivision); *New York State Organization for Women v. Terry*, 704 F.Supp. 1247, 1261 (S.D.N.Y. 1989) (enjoining public nuisance on city's claim under New York law).

Plaintiff has established a probability of success on its public nuisance claim. The evidence showed that the occupations of the Center on April 1 and June 17 interfered with provision of medical services by the Center and a dentist whose office was next door. On April 1, patients were blocked from entering the Center or required to run a gauntlet to enter; some were late for their appointments. On June 17, about twenty-five to thirty-five patients did not show for their scheduled appointments and all patients were late. Although patients were scheduled for treatment, including gynecological exams, dispensing of medication, and abortions, as a result of the occupation no patients could be treated that day. Besides the interference with these medical services, the occupations and subsequent large-scale arrests also diverted substantial police, fire and ambulance services away from their normal allocation in protecting the public. Approximately forty officers, an ambulance and paramedic were assigned to the Center for the duration of each protest and subsequent arrest procedures. On April 1, a fire department unit equipped with the Hurst "jaws of life" tool was also required at the scene, potentially impeding its availability for other emergencies.

The right to medical services, including abortion, and the right to emergency police, fire and ambulance services are rights common to all members of the general public. *See, e.g., Terry*, 704 F.Supp. at 1261-62 (right to medical care). Defendants' conduct has interfered with these rights with an obvious potential to deprive and delay and the public access to medical care and the protection of the Town's police and fire departments.

Plaintiff has also established that the danger created was a continuing one and that defendants' use of the premises was unreasonable. *State v. Tippetts-Abbett-McCarthy-Stratton*, 204 Conn. 177, 183, 527 A.2d 688 (1987) (continuity and unreasonable use of land are necessary elements of nuisance); *Kostyal v. Cass*, 163 Conn. 92, 99-100, 302 A.2d 121 (1972).

The risk to the public was not the result of a single act or isolated, sporadic incident, but of repeated, organized, conjunctive, sustained and willful conduct. Thus, although temporary in duration, the conduct had a continuing effect and was not sudden or unexpected. *See Warren v. City of Bridgeport*, 129 Conn. 355, 358, 28 A.2d 1 (1942) (operation of street sweeper in wrong direction of highway at night was sufficiently continuing danger); *cf. Demare v. Guerin*, 125 Conn. 362, 365, 5 A.2d 711 (1939) (automobile's sudden brake failure not a nuisance); *Kostyal*, 163 Conn. at 101, 302 A.2d 121 (distinguishing continuing danger **[382]** from single act). Its repetition is threatened.

In entering the Center and refusing to leave when ordered to do so, the protesters' use of the property was not merely unreasonable, but unlawful, i.e., criminal trespass. Conn.Gen.Stat. § 53-a-107; Restatement (2d) Torts, § 821B(2)(2) (violation of statute may sustain holding of unreasonableness). The Connecticut cases have applied a "functional test" to determine whether a defendant "uses" property in a manner sufficient to subject him to liability for a nuisance. *Tippetts*, 204 Conn. at 184, 527 A.2d 688. Ownership or tenancy of the property is not a prerequisite to liability. *Id.* *Tippetts* considered a claim that defendant created a public nuisance by negligently designing and supervising the construction of a highway bridge which collapsed more than two decades later. Determining reasonable use in the context, the court stated: "[A] critical factor ... is whether the defendant exercises control over the property that is the source of the nuisance." *Id.* The question of whether a particular defendant's control is sufficient to subject him to nuisance liability "normally is a jury question." *Id.* at 185, 527 A.2d 688.

In the case at bar, defendants' conduct, rather than any condition created on the property, is the source of danger to the public. Assuming the rule stated by *Tippetts* applies, plaintiff

has made a sufficient showing of de facto exercise of control by defendants of the premises. On both the dates in question, the rescuers prevented use of the premises for their intended purposes -- the provision of medical services. On both occasions, a dental office was forced to close; on June 17, the Center was forced to cease its operations. Conversely, defendants used the premises for their own purposes--to dramatize their opposition to abortions and discourage the performance of same. That defendants were eventually ousted does not alter the fact that, for the duration of the protests, defendants appropriated the private premises for a use directly opposed to the owner's intention and wish.

Plaintiff has thus shown a probability of success on the merits of its public nuisance claim. The tendency of defendants' conduct to injure the public is found to lie in the interference with access to medical services and the diversion of police and emergency services necessary to respond to large-scale criminal trespass. Therefore, this finding is limited to those defendants shown by the evidence to have either (1) personally entered and remained on the Center's premises or physically blocked entrance or egress to or from the Center's premises after having received a request from any police officer or employee of the Center or its landlord to leave; or (2) directed or aided and abetted any person to perform the acts listed above. In accordance with the findings of fact made above, an injunction shall issue as to the following defendants:

Operation Rescue
John Kladde
John Charles Grant
Jean Pollock
Catherine A. Jersey
Lillian A. Loughlin
William Calvin
William P. Cotter

(d) Negligence

In view of the determination to grant an injunction against the public nuisance, based on defendants' intentional conduct, it is unnecessary to address the negligence claim in detail. As to those defendants against whom an injunction is issued, a negligence theory would add no relief not already included under public nuisance. As to the other defendants, plaintiff has not introduced sufficient evidence of negligence to permit an injunction.

V. Appropriate Injunctive Relief

A. First Amendment Considerations

In opposing an injunction and arguing the scope of relief, defendants rely heavily upon the assertion that an injunction would chill the free exercise of their first amendment rights. The short answer **[383]** to this argument is that defendants have no first amendment right to carry on even pure speech activities on private property and against the wishes of the Center and its landlord. *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); *Cologne v. Westfarms Associates*, 192 Conn. 48, 66, 469 A.2d 1201 (1984); *cf. Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420 (1988) (no right to force speech into the home of unwilling listener). The same principle certainly applies to conduct such as remaining on the premises after being instructed to leave or the blocking of exists and entrances. At the hearing on injunctive relief, the landlord's property manager made clear his objection to the latter activities on the subject premises. This objection and the Center's intervention in this action in support of an injunction take that conduct out of the protection of the first amendment altogether.

Attempts to persuade others are within the core of the first amendment's protection. *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 325, 89 L.Ed. 430, *reh'g denied*, 323 U.S. 819, 65 S.Ct. 557, 89 L.Ed. 650 (1945). Expressive conduct such as picketing, leafleting, and demonstrating enjoys the same freedom. *See Frisby*, 108 S.Ct. at 2499. As defendants point out, even expression intended to be "coercive" or "offensive" is protected provided by the speaker refrains from violence and the threat of violence. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911, 916, 102 S.Ct. 3409, 3424, 3427, 73 L.Ed.2d 1215, *reh'g denied*, 459 U.S. 898, 103 S.Ct. 199, 74 L.Ed.2d 160 (1982); *Texas v. Johnson*, ____ U.S. ____, 109 S.Ct. 2533, 2541-42, 105 L.Ed.2d 342 (1989) (offensive speech). Yet, a bright line is crossed at the threshold of private property. Forcible, unauthorized entry on the Center's property, willful trespass, is to protected conduct no matter what its purpose. *See Northeast Women's Center, Inc. v. McMonagle*, 670 F.Supp. 1300, 1308 (E.D.Pa. 1987), *aff'd in part, remanded in part*, 868 F.2d 1342 (3d Cir. 1989); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988) (approving injunction against trespass and obstruction of access to abortion clinic); *see Claiborne*, 458 U.S. at 920, 102 S.Ct. at 3429. Moreover, the clarity of this principle is such that an injunction framed upon it carries no chilling effect against protected first amendment expression. Accordingly, an injunction shall issue in restraint of the listed defendants during the pendency of this action.

NOTICE

It is noted that of the defendants against whom injunctive relief is to be granted, the following defendant has not been served:

John Charles Grant

As to that defendant, plaintiff shall complete service within twenty (20) days hereof and file a return thereof. Service shall include a copy of this order as well as the complaint. Defendant shall, within twenty (20) days of service, show cause by filing, in writing, any reasons why this order should not, for the reasons set forth herein, be binding on him. Absent such filing, this order shall, after twenty (20) days subsequent to service in accordance herewith, be of full force and effect and binding upon such defendant.

B. *Preliminary Injunction*

IT IS HEREBY ORDERED that defendants:

Operation Rescue
John Kladde
John Charles Grant
Jean Pollock
Catherine A. Jersey
Lillian A. Loughlin
William Calvin
William P. Cotter
Hjalmar Syversen

shall not hereafter, during the pendency of this action, unless excused or altered by further order of this court: enter or remain upon the property or offices of the Summit Women's Center in the Town of West Hartford, Connecticut; physically block, obstruct, or otherwise impede access (either ingress or egress) to the property or offices **[384]** of the Summit Women's Center in the Town of West Hartford, Connecticut, either by themselves, individually, or in conjunction with others, direct, aid, abet, counsel, procure, arrange, encourage, or assist any person to perform the actions above listed.

This order shall be binding only upon defendants Operation Rescue, John Kladde, John Charles Grant, Jean Pollock, Catherine A. Jersey, Lillian A. Loughlin, William Calvin, William P. Cotter, and Hjalmar Syversen, and upon their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Violators of this order may be adjudged in contempt of court.

SO ORDERED.